153 US 177

153-177

RECORD, CASE NO. 14387.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 334.

JOEL B. ERHARDT, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LEWIS STEINHARDT, MORRIS STEINHARDT, AND HENRY STEINHARDT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 27, 1890.

RECORD, CASE NO. 14387.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 334.

JOEL B. ERHARDT, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

LEWIS STEINHARDT, MORRIS STEINHARDT, AND HENRY STEINHARDT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Complaint	5	2
Bill of particulars	6	4
Answer	7	5
Minutes of trial	9	6
Judgment	11	7
Bill of exceptions	13	7
Invoice	14	8
Extracts from tariff act	15	8
Testimony of Adolph Strasser	16	9
August Immig	23	13
J. McC. Parrington	24	13
Alfred H. Kennedy	25	14
Russell W. Moore	25	14

	Original.	Print.
Bill of exceptions—Continued.		
Testimony of Dr. John F. Davis	28	15
Henry E. G. Luyties	31	17
Edward Stryker	38	20
Henry Carmayer	39	21
Charles E. Hoffman	39	21
George C. McKesson	40	21
Frank S. Edminster	40	21
James Duffy	41	22
Henry J. Smith	42	22
William Renn	42	23
Martin Bathman	43	23
Charge to the jury	44	23
Defendant's request	44	23
Judge's certificate	46	24
Assignment of errors	48	24
Citation	50	25
Proof of service of citation	51	25

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Lewis Steinhardt, Morris Steinhardt, and Henry Steinhardt, plaintiffs, and Joel B. Erhardt, defendant, a manifest error hath happened to the great damage of the said Joel B. Erhardt, plaintiff in error, as by his complaint appears. We be willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of the October term, eighteen hundred and ninety, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-one, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Joel B. Erhardt, plaintiff in error, against Lewis Steinhardt, Morris Steinhardt, and Henry Steinhardt, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 21st day of October, in the year of our Lord, one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) 15576. U. S. Supreme Court. Joel B. Erhardt, plaintiff in error, against Lewis Steinhardt et al., defendants in error. Writ of error. Edward Mitchell, U. S. attorney and attorney for plaintiff' in error.

Due service of a copy of the within writ of error is hereby admitted this 9' day of Oct., 1890. Hartley & Coleman, attorneys for defendants in error. U. S. circuit court. Filed Oct. 9, 1890. John A. Shields, clerk. E. & A. A. 936.

3 United States circuit court for the southern district of New York.

LEWIS STEINHARDT, MORRIS STEINHARDT, AND Henry Steinhardt *against* JOEL B. ERHARDT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, this 17' day of December, in the year one thousand eight hundred and eighty-nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

HARTLEY & COLEMAN, *Plaintiffs' Attorneys.*

Office and post-office address, 62 Wall st., New York City.

4 (Indorsed:) 3318. United States circuit court, southern district of New York. L. Steinhardt et al. *vs.* Joel B. Erhardt. Summons. Hartley & Coleman, plaintiffs' attorneys. To the defendant within named: Take notice, that upon default judgment will be taken for the sum of dollars, in money, with interest from the day of , 18 , besides costs. , plaintiffs' attorneys. Personally served Dec. 17, 1889. Custom-house, New York.

5 United States circuit court, southern district of New York.

LEWIS STEINHARDT, MORRIS STEINHARDT, & Henry Steinhardt, plaintiffs, *against* JOEL B. ERHARDT, DEFENDANT. } Complaint.

Plaintiffs complain:

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm name of Steinhardt Brothers & Company, and, as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. That plaintiffs, in order to obtain said goods, were compelled to pay the defendant, as such collector, in excess of the lawful rate of duty on said goods, and of the amount required by law, the sum of thirteen hundred & thirty-four $\frac{70}{100}$ dollars.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto.

5th. That plaintiffs made due and timely appeals on each entry to the Secretary of the Treasury, who affirmed the decision of the defendant.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, if rendered; together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for the sum so exacted as aforesaid, with interest on the several sums named in the bill of particulars, from the latest several dates of payment as appear thereby, together with the costs and disbursements of this action.

HARTLEY & COLEMAN,
Attorneys for plaintiffs.

(Indorsed:) U. S. circuit court, southern district of New York. L. Steinhardt et als. against Joel B. Erhardt. Complaint and bill of particulars. Due service of a copy hereof is hereby acknowledged, this day of 188 . Atty. for deft. Hartley & Coleman, plffs' attorneys, 62 Wall street, New York City.

[Name of importer (for all the importations), Steinhardt Bros. & Co.]

	Description of goods.	Name of vessel.	Whence imported.	Date of invoice.	Date of entry at custom-house	Date of payment of duties in excess.	Amount of duty illegally exacted.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.	
				1889.	1889.	1889.		1889.	1889.	1889.	
1	Boone Kamp Bitters	Noordland	Antwerp	June 14	July 2	July 26	$654.70	July 24	July 24	Sept. 19	84,711
2		Westerland	do	July 5	" 23	Aug. 26, Oct. 15.	680.00	Aug. 9	Aug. 9	" 19	85,316
							1,334.70				

7 Circuit court of the United States for the southern district of New York.

LEWIS STEINHARDT ET AL.
versus
JOEL B. ERHARDT, COLLECTOR, ETC. } N. S. 15576.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with the defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering, he alleges that this action was not brought within ninety days after the decision of the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon, or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had and without ninety days having elapsed from the date of such appeal.

IX. And further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by the plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to

the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

EDWARD MITCHELL,
United States Attorney, Attorney for the Defendant.

8 (Indorsed:) 15576. U. S. circuit court, southern district of New York. Lewis Steinhardt et al. vs. Joel B. Erhardt, collector, etc. Copy. Answer. Edward Mitchell, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated New York, Feb'y 5, 1890. Yours, &c., Edward Mitchell, U. S. att'y & att'y for deft. To Hartley & Coleman, esqs., attorneys for plaintiffs.

9 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Thursday, the 1st day of May, in the year of our Lord one thousand eight hundred and ninety.

Present: The honorable E. Henry Lacombe, circuit judge.

LEWIS STEINHARDT ET AL.
vs.
JOEL B. ERHARDT. } N. S. 15576.

Now come the plaintiffs, by Edward Hartley, esq., their attorney, and ove the trial of this cause.

Mr. Hartley moves the court for permission to amend the complaint by inserting the name of Adolph Strasser.

The motion is granted.

Likewise comes the defendant, by James T. Van Rensellaer, esq., assistant United States attorney, his attorney.

Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence of the respective parties and the argument of counsel, the jury, on the 2d inst., by direction of the court, say that they find a verdict for the plaintiffs in the sum of five hundred and sixty-three dollars and sixty-four cents, and so they say all.

On motion of James T. Van Rensellaer, esq.,

10 Ordered, that the defendant have a stay of sixty days in which to make and serve a case with leave to turn the same into a bill of exceptions.

On like motion, ordered that a certificate of probable cause be granted.

An abstract of the minutes.

JOHN A. SHIELDS,
Clerk.

11 U. S. circuit court, southern district of New York.

LEWIS STEINHARDT, ADOLPH STRASSER, MORRIS Steinhardt, and Henry Steinhardt, *vs.* JOEL B. ERHARDT. } N. S. # 15576.

This cause having, at the April term, A. D. 1890, of this court, to wit, May 1st, 1890, come on to be tried before the honorable E. Henry Lacombe and a jury, and a verdict having on the 2nd day of May, 1890, been rendered in favor of said plaintiffs and against the said defendant for the sum of five hundred and sixty-three dollars and sixty-four cents, and the costs and disbursements of said plaintiffs have been adjusted and taxed in the sum of fifty-eight dollars and eighty-five cents, and interest on the said verdict having been computed and allowed in the sum of fourteen dollars and sixty-five cents, which said debt and damages, costs, and disbursements and interest amount in the whole to the sum of six hundred and thirty-seven dollars and fourteen cents, now, on motion of Hartley & Coleman, plaintiffs' attorneys, it is considered that the plaintiffs have judgment against the said defendant for the said sum of six hundred and thirty-seven dollars and fourteen cents, and have execution therefor, and it is hereby certified that the said defendant had probable cause in

12 making the execution herein complained of.

Judgment signed this 8th day of October, 1890.

JOHN A. SHIELDS,
Clerk.

(Endorsed:) U. S. circuit court, So. dist. of N. Y. L. Steinhardt et al. vs. J. B. Erhardt. Judgment record. Hartley & Coleman, plaintiffs' att'ys, 62 Wall st., New York City. U. S. circuit court. Filed Oct. 8, 1890, 3:45 p. m. John A. Shields, clerk.

13 United States circuit court, southern district of New York.

LEWIS STEINHARDT ET AL. *vs.* JOEL B. ERHARDT. } N. S. 15576.

Defendant's bill of exceptions.

And afterwards, to wit, on the 1st day of May, 1890, this case came on to be tried before the honorable E. Henry Lacombe, United States circuit judge, and a jury duly empannelled and sworn to try the issues herein.

The parties appeared by their counsel, Messrs. Edward Hartley and J. Augustus Stanwood, for the plaintiffs; and Messrs. Edward Mitchell, United States district attorney, and James T. Van Rensselaer, assistant United States district attorney, for the defendant; and during the course of the trial and before the rendering of the verdict therein the counsel for the defendant did take and allege certain exceptions to certain rulings of the court, which said exceptions were by the court duly allowed and are hereinafter specifically set forth.

To sustain the issues upon their part the plaintiffs introduced evidence tending, among other things, to show that as the firm of Steinhardt Bros. & Co., in the month of July, 1889, by the steamers "Noordland" and "Westernland," they imported certain merchandise, invoiced to them by E. Masquelier, from Belgium, which invoices were substantially alike, and one of which, omitting the consular attestation and oaths, reads as follows, viz:

14

[Firme A. E. Boonekamp, fondée en 1815, distillerie du véritable Amer Boonekamp. Dépôt à Anvers, 39, Place de Meir, 39.]

Messieurs Steinhardt Bros. et. Cie. doit à E. Masquelier, propriétaire du secret de fabrication, pour vente et livraison faites comme suit, expédié par St. Noordland, payable à Anvers au comptant:

BORGERHOUT, *le* 14 *Juin*, 1889.

Marques.	Flacons.	Amer A. E. Boonekamp.	
S.B.&Co.	Qts.		Frs.
	4,500	70 caisses, 12 flacons, frs. 15.....	1,050
	(4,569)		
	Pts.		
	4,570	200 cs. 12½ " frs. 7	1,400
	4,769		
	4,770	100 cs. 24¼ " frs. 7.....	700
	7,867		3,150
70 caisses à frs.	5 frs.	350	
200 " "	3 "	600	 1,250
100 " "	3 "	300	
		1,250	4,400

Soit douze cent cinquante francs, caisses, cartons étiquettes, bouteilles et emballage non compris dans le prix de la marchandise.

Dans l'attente de vos ordres ultérieurs reçevez, Messeieurs, l'assurance de ma parfaite considération.

E. MASQUELIER,
Firme A. E. Boonekamp.

15 On which the defendant, then the collector of customs at the potr of New York, assessed duties as upon "bitters (not proof)" at the rate of two dollars ($2.00) per proof gallon, and three cents (3c.) for each bottle, under two provisions of Schedule H of the tariff act of March 3, 1883, as follows:

"Wines, brandy, and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package; and all such bottles, except as specially enumerated or provided for in this act, shall pay an additional duty of three cents for each bottle."

* * * * * * *

"Cordials, liquars, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon."

That the plaintiffs paid the amount of such duties at said rates to obtain possession of the said merchandise, and within the time provided by law, duly protested against the said assessment of duties, claiming that said bitters were dutiable at fifty per centum ad valorem as a "proprietary preparation and bitters" under Schedule A of said tariff act, which provision is as follows:

"Proprietary preparations, to wit: All cosmetics, pills, powders, troches,
or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, lini-
16 ments, salves, ointments, pastes, drops, waters, essences, spirits, oils
or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases, or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum ad valorem."

And that the filled bottled were dutiable at thirty per centum ad valorem under Schedule B of said act, as follows:

"Green and colored glass bottled, vials, demijohns and carboys (covered or uncovered), pickle or preserve jars, and other plain, moulded or pressed, green and colored bottle glass, not cut, engraved, or painted, and not specially enumerated or provided for in this act, one cent per pound; if filled and not otherwise in this act provided for, said articles shall pay thirty per centum ad valorem in addition to the duty on the contents;"

That appeals were duly taken to the Secretary of the Treasury and that the latter officer duly affirmed the decision of the defendant collector upon said appeals, and this suit was seasonably brought thereupon.

Adolph Strasser, one of the plaintiffs, testified that for about ten years he had been an importer of wines, liquors, cordials, bitters, &c. After
identifying the invoices, entries, protests, and papers in suit which
17 were put in evidence, the witness proceeded to testify among other things that his firm had dealt in the article in suit, A. E. Boonekamp bitters, since February, 1889; that they purchased it from E. Masquelier at the prices named in the invoice, and thereupon produced two bottles as samples of the goods, and holding up one sample said this is a half pint, and it is in its original condition. It was offered in evidence and marked Exhibit S 3. The quarts and pints were similarly gottten up.

Mr. VAN RENSELAER: I wish it noted that the label is in a foreign tongue, and unintelligible, except so far as the words in red ink thereon go. I object to the introduction of the label in evidence as being in the Dutch language, and as apparently immaterial and irrlevant.

The COURT. I will overrule the objection. The label can be called S–3; the bottle which comes out of the label can be marked S–3–A.

To this ruling the defendant excepted, which exception was allowed by the court. The said label, which was on importation closely wrapped around the bottle, was in the words and figures following, viz:

Stamped on the face of this label in red ink were the words, "Registered at the Patent Office, Washington, D. C. No. 4042. Nov. 24, 1885.

Silver medal, Amsterdam, 1883.
Two gold medals, Antwerp, 1885.
Gold medal, Liverpool, 1886.

"Maag Bitter, onder de Zinsprieuk. Occidit qui non servat.

Het welk door de eerste en
18 voornaamste personen van dit Rijk en een overgroot aantal inwooders, dezer stad en deszelfs omstreeken met zoo veel nut gebruikt word.

Word met veel success verkogt bij E. Masquelier, opvolger van A. E. Boonekamp, to Borgerhout, by Antwerpen.

N. B.—Degene welke de hier nevens staande griffie of cachet van de flesch zounde namaken zal voor de Regtbankeen vervolgd worden.

A. E. BOONEKAMP.

Sole agents for the U. S.: Steinhardt, Bros. & Co., Brooklyn & New York."

Diplomas of honor, Paris & Havre, 1887.
Universal Exhibition, Adelaide, 1887. The first award diploma of honor & gold medal, Brussels, 1886.

Plaintiffs' counsel offered in evidence a paper surrounding the bottle as originally imported, of which the following is a copy, viz:

"Maag Bitter Boonekamp, known under the motto, occidit qui non servat.

(Here follow representations of medals & diplomas of honor awarded.)

Distillery of E. Masquelier, successor to A. E. Boonekamp, Antwerp (Belgium). Established in 1815.

19 These fine stomachic bitters, known as "Boonekamp," are the outcome of a fortunate discovery made by Mr. A. E. Boonekamp, of Antwerp (Belgium), in the year 1815.

The valuable properties they possess as an appetizer and as a regulator to the human system have been fully appreciated from the first; and their increasingly rapid consumption has since proved them to be a complete and signal success. Doctors of the highest European repute recognize the exceptional value of their aperient and digestive qualities. In Belgium and Holland they are used by every household, and are the vade mecum of the traveller. As a preventative against all forms of epidemic disease

they are unvaluable. When taken in doses of one spoonful, undiluted, before each meal they aid digestion and impart a healthy and vigorous action to the system. They also make a pleasant refreshing beverage taken with water, gin, or aniseed cordial.

Some unscrupulous manufacturers, taking advantage of this great reputation these bitters have gained, have from time to time been trying to get up some spurious article and sold it for genuine, but in most cases they have been discovered and made to pay heavy damages, as the records of the tribunal of commerce of Antwerp, and the court of appeals of Brussels will show. Any intelligent person will see at a glance that if these pretended Boonekamp Bitters manufactured in Germany were genuine and original from that country the labels would necessarily be printed in the German language; instead of that they are a facsimile of mine all except
20 the seal and signature; consequently every bottle of the so-called Boonekamp Bitters manufactured in Germany and sold in the United States, carries the proof on its face that its contents are nothing but a spurious article. The studies of these counterfeiters have only tended to produce an article entirely different from mine, and any person tasting once the genuine Boonekamp Bitters will easily detect all imitations. Everybody should be cautioned in buying, as the sole, genuine, and original Boonekamp Bitters carries the seal and signature of A. E. Boonekamp, of Antwerp, Belgium, and is only manufactured by E. Masquellier, his successor.

The juries of the numerous exhibitions in which I have participated have invariably done justice to the great medicinal and other properties of my productions, by awarding it the following distinctions:

Amsterdam, 1883, silver medal.
Antwerp, 1885, silver & gold medal (exportation).
Antwerp, 1885, gold medal (industry).
Liverpool, 1886, gold medal.
Paris, 1887, diploma of honor.
Havre, 1887, diploma of honor.
Adelaide, 1887, first order of merit.
Ostende, 1888, member of the jury.
Brussels, 1888, diploma of honor (industry.)
Brussels, 1888, gold medal (exportation).

I have appointed Mrs. Steinhardt Bros. Co., of Brooklyn and New York, as sole agents for the United States, and as a further guarantee of genuineness the name of this firm will in future be affixed to
21 every bottle of Boonekamp Bitters I export to the United States.

All consumers should compare the labels with those of the original Boonekamp Bitters, as under.

(Here follows the label already in evidence.)

The foregoing circular was printed in the following languages on the same paper in English, French, Flemish, & German.

(Paper objected to by defendant as being partly in a foreign language, and as immaterial. Objection overruled by the court; to which ruling the defendant duly excepted, which exception was allowed by the court.)

Plaintiff's counsel offered in evidence a certified copy of the label of the bitters in suit filed by E. Masquelier, of Borgerhout, Antwerp, Belgium, in the Patent Office at Washington on the 27th day of October, 1885, of which the following is a copy:

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the label, registered by E. Masquelier, November 24, 1885, of which the following is the title: "A. E. Boonekamp, Maag Bitter."

In testimony whereof I, C. E. Mitchell, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 17th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

[L. S.] C. E. MITCHELL,
Commissioner.

22 No. 4642.

UNITED STATES OF AMERICA.

PATENT OFFICE.

To wit: Be it remembered, that on the twenty-seventh day of October, anno Domini 1885, E. E. Masquelier, of Borgerhout, Antwerp, Belgium, deposited in this office for registration a label, of which the following is the title: "A. E. Boonekamp Maag Bitter," the right whereof he claims as sole proprietor, in conformity with the law of the United States entitled "An act to amend the law relating to patents, trade-marks, and copyrights," approved June 18, 1874.

In testimony whereof I have caused the seal of the Commis-
[L. S.] sioner of Patents to be hereunto affixed this twenty-fourth day of November, 1885, and of the Independence of the United States the one hundred and tenth.

Given under my hand at Washington, D. C.

The foregoing is a copy of the record, and attached hereto is a copy of said label.

M. V. MONTGOMERY,
Commissioner of Patents.

Maag Bitter,

Onder de Zinspreuk

Occidit, qui non servat.

Het welk door de eerste en voornaamste Personen van dit Rijk en een overgroot aantal inwoonders dezer stad en deszelfs omstreeken met zoo veel nut gebruikt word.

23 Word met veel success verkogt bij E. Masquelier, opvolger van A. E. Boonekamp, te Borgerhout, by Antwerpen.

N. B.—Degene welke de hier nevens stande griffie of cachet vande flesch zounde namaken, zal voor de ragtbanken vervolgd worden.

A. E. BOONEKAMP.

(Objected to by the defendant as immaterial and irrelevant. Objection overruled. Exception by defendant, which exception was allowed by the court.)

On cross-examination he testified that he had personally sold the bitters in suit to family trade, and to liquor dealers more than any other class of trade. Have seen a bitters manufactured by a German firm which they label "Boonekamp of Maag Bitters;" they do not label it the same as the other; have seen the name of H. Underburg Albrecht on their label. The Boonekamp bitters of Mr. Masquelier have been manufactured in Europe since 1815. On redirect examination he said the bitters in suit come from Belgium; the other from Germany. Our bitters are sold to families, grocers, and druggists, almost always in small quantities, a case at a time. It is sold for a medicine or tonic; used for cramps, dysentery, or sick stomach. It is sold to wholesale druggists—to Crittenton & W. H. Schieffelin & Co., for instance—to retail drug stores, but our principal trade is with liquor dealers. August Immig, for plaintiff, testified that he was agent for the A. E. Boonekamp bitters in suit from 1885 to 1889; obtained the goods from the factory at Antwerp, in Belgium; was in Antwerp in 1887, and visited the factory four or five times; that

24 he sold these bitters to stores, druggists, drug stores, liquor stores, saloons, and groceries; that he was not a chemist or a doctor.

Q. Do you know for what purpose those bitters are used?

A. Yes, sir; I do.

Q. What was it?

(Objected to by defendant on the ground that the witness does not appear to be competent to answer. Question allowed; exception by defendant, which exception was allowed by the court.)

A. It is used for the instantaneous relief of cramps or dysentery. It is used for that, and also by mixing it it is claimed to be an infallible cure for dyspepsia.

Q. Mixing with what?

A. With water, wines, or liquors.

Mr. VAN RENSSELLAER. I move to strike out the answer, on the ground that the witness states that it is only claimed to be a remedy; that the witness has no knowledge.

The WITNESS. Yes; I know of my own knowledge.

(Motion denied; exception by defendant; exception allowed by the court.)

On cross-examination witness testified that out of 700 boxes of these bitters sold by him in a year, he sold a couple of hundred to drug stores and about 300 to liquor stores; that these bitters were sold by the liquor trade over their counters mixed with water, wine, and gin.

The plaintiffs proved by the testimony of Joseph McC. Parrington the value and character of the bottles containing the bitters in suit, and
25 that as Government examiner, he had returned the invoices "bitters not proof."

The plaintiffs also introduced the evidence of Alfred H. Kennedy, buyer of proprietary medicines with Charles N. Crittenden & Co. of New York city, which tended to show that this firm were the largest dealers in patent medicines in the country; that they had bought and sold the article in suit—sold it to druggists—has known the article in suit about ten years.

The plaintiffs also produced evidence that the difference between the amount of duties paid by them on said merchandise and the amount at which they claimed the said duties should have been assessed by the defendant, collector, under plaintiffs' protests, was the sum of $552.34

Together with interest due thereon..... 11.30

Making a total of..... $563.64

To sustain the issues on his side, the defendant produced the evidence of Russell W. Moore, analytical chemist in the appraiser's department at the port of New York, whose testimony tended to show that he had made an analysis of the bitters in suit to ascertain the amount of alcohol therein contained, which analysis showed:

Absolute alcohol by volume..... 51.70 per cent.
Absolute alcohol by weight..... 47.41 "

That the term "proof spirits" described a spirit, of which at 51 degrees Fahrenheit, 13 volumes shall be equal to 12 volumes of water; 49.24 per cent of alcohol by weight 50.76 per cent of water; that the bitters in suit were about five degrees under proof.

26 Q. Are you familiar, in your duties as analytical chemist in the appraiser's stores, with the volume or quantity of alcohol contained in other liquors?

A. Yes; quite so. I do all the analysis of that description.

Q. Please state what quantity of alcohol by weight is in the liquids ordinarily understood as "liquors," as used in paragraph 313. (Referring to Heyl. Tariff Indexed.)

(Objected to by the plaintiffs as indefinite. Objection sustained. Exception by defendant, which exception was allowed by the court.)

Q. Are you familiar with the amount of alcohol by weight contained in arrack?

By Mr. HARTLEY:

Q. Did you analyze it?

A. No.

(Question objected to by plaintiff. Excluded. Exception by defendant allowed by court.)

The testimony of the witness further showed that the amount of alcohol by weight contained in absinthe was on an average about 47 to 48 per cent.

Q. Have you ever analyzed any of the cordials mentioned at the head of paragraph 313?

A. I have analyzed cordials.

Q. Please state between what limits by weight the alcohol in cordials runs?

(Objected to by plaintiffs unless a particular cordial is specified. Question excluded. Exception by defendant allowed by the court.)

That he had analyzed peppermint cordial and found about 55 per cent of alcohol in it by weight; likewise curacoa, and found from 25 to
27 35 per cent of alcohol; creme de vanille and creme de cacao, and found about 55 per cent of alcohol by weight.

On cross-examination the witness testified that he had analyzed a French bitters known as "Fernet bitters," and found 47.9 per cent of alcohol by volume, that is, about 45 per cent by weight; also Anchor bitters, and found 44.5 per cent by volume, which is about 41 per cent by weight.

Q. Did you find anything there (in analyzing plaintiffs' bitters) but alcohol?

A. Yes.

Q. Was there any extracted matter there?

A. Yes; considerable.

Q. Did you make a precipitate?

A. It was precipitated.

Q. Did you take it up again?

A. Yes.

Q. How much alcohol did it require to take it up?

A. I did not measure the amount of alcohol, I simply put the distillate back into the distilling vessel and got a clear liquid again.

Q. Can you tell from your experience as a chemist what other drug, or what drug, if any, was contained in the Boonekamp bitters?

A. I could form an opinion as to what was in there.

Q. Will you state what it was?

(Objected to by defendant unless the witness has made such an analysis as to state what the composition is; that he has testified that he did not make any analysis except to determine the weight by volume of alcohol. Question allowed. Exception by defendant, which exception was
28 allowed by the court.)

A. I should think there was orange peel in it; I know there is tumeric in it, and an essential oil, which I think is the oil of anise; and from an experience which I once had with Boonekamp bitters I judge there is some rhubarb in it; rhubarb is a drug, a cathartic.

Witness further testified on cross-examination that from what he saw of the article in suit he should think it good for a beverage, to be drunk in moderation like whiskey or brandy or any other spirit; that alcohol was invariably an ingredient in all the bitters he had analyzed; that the cordials he had analyzed except the curacoa were above proof.

On redirect examination the witness testified that he thought he could imitate the bitters in suit pretty well; that he had seen the analysis published of Boonekamp bitters in the Druggists' Circular in 1888; he hardly thought that his examination would show whether there was anything secret about the composition of these bitters; that the secret might be penetrated by careful analysis, and he should think that the bitters could be made after an analysis to imitate the original very closely.

The defendant further produced the evidence of Dr. John F. Davis, a practicing physician and an examiner of drugs in the United States appraiser's stores at the port of New York.

Witness had also had experience as a druggist.

The testimony of this witness tended to show that there was no
29 such term in medicine as "bitters;" that is, not as a regular preparation, they are not in the pharmacopœia, but if you look upon proprietary preparations under the name of bitters, then there is such a term such as Atwood's jaundice bitters; that he had made up "Stoughton bitters," which he had sold principally to liquor dealers; that "Stoughton bitters" were composed of gentian, orange peel, some Angostura bark, brandy or alcohol, water, and a coloring matter composed generally of cochineal; that gentian is known as a tonic—an invigorant; that bitter orange peel is a tonic and an aromatic; that Angostura bark is used as a tonic to the stomach; that the alcohol by weight in witness's Stoughton bitters was about 55 per cent.

Q. Are drugs or medicinal articles of the nature of gentian and the others you have mentioned prescribed in medicine in compounds of the nature of bitters?

A. As I stated before, we don't know anything in medicine under the term of bitters. When we prescribe gentian it is bitter to the taste, of course, but we use them as a tonic principally and containing as little alcohol as possible. The gentian, when given as a tonic, is given in the form of an infusion. Tonics containing alcohol, or such things as are used as tonics, would perhaps be popularly known as "bitters."

Witness further testified that he knew of the existence of cordials, such as *crême de menthe*, which signified in English "cream of peppermint;" that peppermint was an aromatic; that its effect if strong would be to
produce anasthesia; that it had a medicinal property in small
30 quantities; that kirschwasser contains the acid known as hydrocyanic acid or prussic acid; that this acid has a slightly medicinal effect; that wormwood contained in "absinthe" has a medicinal effect upon the human system as a tonic; that anisette, also contained in absinthe, has a medicinal effect as relieving flatulency—it is used as a medicine for children.

On cross-examination the following questions were put to and answers received from the witness:

Q. Were you aware as a druggist that there were a large number of things that were called proprietary bitters?

A. Yes; that came under that term.

Q. In other words, these bitters were called quack medicine or patent medicines?

A. Yes; they were called patent medicines.

Q. And bitters as a class fall under the definition of patent medicine?

(Objected to by defendant as immaterial, and that there is no evidence that there is a class of bitters known as "quack" medicines. Question allowed. Exception by defendant, which exception was allowed by the court.)

A. I think I said a while ago that there are bitters which are known as proprietary medicines, and there are bitters known as drinks. I shall have to explain the word in two different ways—one as a drink and the other as a proprietary medicine.

Witness further testified on cross-examination that neither absinthe nor kirschwasser, nor arrack, nor curacoa was a proprietary preparation.

31 Defendant also produced the evidence of Henry E. G. Luyties, of the firm of Luyties Brothers, importers of wines and liquors in New York City.

The testimony of this witness tended to show that his firm had done business for about twenty-two years with, and for ten years or so had been the sole representatives of, H. Underberg Albrecht, of Prussia, who manufactures a "Boonekamp of Maag-Bitter;" that the word "of" in the Dutch language means "or;" that "Maag" means "stomach;" that he had imported that article of bitters for about twenty-two years; that it was an article widely known to the trade in this country; that it had been manufactured in Europe about 50 years; that there had been a great deal of litigation in Europe relating to the Boonekamp Bitters, a great deal in Germany, and some in Belgium.

Q. Do you know, in relation to the legal proceedings in Belgium, whether they were brought by Mr. Underberg Albrecht or against him?

(Objected to by plaintiffs. Excluded. Exception by defendant, which exception was allowed by the court.)

The defendant offered in evidence a circular in the French language, accompanying the bottles of the Boonekamp Bitters, manufactured by H. Underberg Albrecht in Prussia, which circular was translated by the witness in part, as follows:

"To contradict the rumor, which is not founded, that the preparation and the exclusive sale of Boonekamp were forbidden by the authorities of sanitary police because it contained ingredients of medicine or

32 medicines whose preparation and whose sale are not permitted except to physicians, according to the rules of the sanitary police, and to assure the public, I declare that the orders pronounced in this sense in the first instance by the court of justice of Rhineberg have been revoked by the decree of the second court or of the court of appeals in Cleves, dated May 21, 1852, and by the senate or higher court or court of appeals of Hammi, dated June 2, 1852. To these decrees not alone, but by the concession of the government of Dusseldorf, it has allowed and adjudged to me the free preparation and exclusive sale of the Boonekamp of Maag-Bitter. After these decrees of the two courts of justice in the province of Rhineberg and the ancient provinces of Prussia, that the Boonekamp of Maag Bitters is not a liqueur of which the preparation, according to the decrees of the sanitary police, is exclusively reserved for the pharmacists; on the contrary, as it has been pronounced that, although it has the quality of a medicine, the Boonekamp of Maag-Bitter is free from all penal prosecution, and especially paragraph 345 of the penal code of the state of Prussia, and in consequence I have obtained the free permission to distill and sell and send it away and recommend it everywhere."

The court held here on objection that this was proof of nothing, but the contents of the circular.

The witness further testified that he sold the Boonekamp Bitters imported by him to druggists, liquor dealers, grocers, and others.

33 Q. Do you know of any other persons or firms who manufacture or who have manufactured Boonekamp Bitters in Europe?

(Objected to by plaintiffs' counsel as immaterial and incompetent.)

Mr. VAN RENSSELAER. The object is to show that these Boonekamp Bitters are manufactured very largely and generally in Europe by very many different people; that it is an article which has been known for half a century.

The COURT. The question is excluded so far as it relates to the condition of affairs in Europe; the testimony is confined to what the trade in this country prior to the act of 1883 knew or understood touching this article.

(Exception by defendant, which exception was allowed by the court.)

Defendant's counsel offered in evidence certified copy of the label filed on the 7th day of September, 1883, in the Patent Office, at Washington, by Hubert Underberg Albrecht, of Rheinberg, Prussia, Germany, of which label and certificate the following is a copy:

DEPARTMENT OF THE INTERIOR, UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the label registered by Hubert Underberg Albrecht, October 2, 1883, number 3567, of which the following is the title: "Boonekamp of Maag-Bitter" (for a tonic beverage).

34 In testimony whereof I, C. E. Mitchell, Commissioner of Patents, have caused the seal of the Patent Office to be affixed
[L. S.] this 18th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

C. E. MITCHELL,
Commissioner.

No. 3567.

UNITED STATES OF AMERICA.

PATENT OFFICE.

To wit: Be it remembered that on the seventh day of September, anno Domini 1883, Huhert Underberg Albrecht, of Rheinberg, Prussia, Germany, deposited in this office for registration a label of which the following is the title:

"Boonekamp of Maag-Bitter"

(for a tonic beverage),

the right whereof he claims as sole proprietor, in conformity with the law of the United States entitled "An act to amend the law relating to patents, trade-marks, and copyrights," approved June 18, 1874.

In testimony whereof I have caused the seal of the Commissioner of Patents to be hereunto affixed this second day of October, 1883, and of the Independence of the United States the one hundred and eighth.

[L. S.]

Given under my hand at Washington, D. C.

35 The foregoing is a copy of the record and attached hereto is a copy of said label.

E. M. MARBLE,
Commissioner of Patents.

Boonekamp,

of

Maag-Bitter,

onder de zinspreuk:

Occidit, qui non servat.

Het welk door de eerst en voornaamste Personen buitens' lands, een overgroot aantel Inwoöners van dit Ryk en deze Stad, en deszelfs omstreeken met zoo vell nut gebruikt wordt.

Word alleen varvaardigt en met veel Succes verkocht by

H. Underberg Albrecht, to Rheinberg Provincie, Rhynland in Duitschland.

N. B.—Geene Fleeschen worden voor egt erkent dan die welke met bovenstaande Stempel gezegelt zyn en welkers bijgevoegd biljet door mij zijn onderteekend.

Luyties Brothers, N. Y., sole agents for the United States.

The witness Luyties further testified that his firm commenced to import about 2,500 cases per year of these bitters and went up to five or six thousand per year.

36 On cross-examination witness testified that the bitters imported by his firm and the bitters in suit were not the same and are not made of the same materials and are not the same bitters; they were similar, but could be immediately distinguished from one another; don't know any other Boonekamp Bitters in this country besides those testified about.

That kirschwasser was simply an article produced by distillation of cherries with their pits; it was used as an after-dinner drink, sometimes in coffee. It is not used for the same purposes and in the same way as these bitters are used. It does not contain rhubarb or any drug of that kind. Ratafia is a sort of a cordial.

Q. Are you acquainted with a cordial known as curaçoa?

A. Yes.

Q. Do you import it?

A. Yes.

Q. What are the points of resemblance and what are the points of difference between cordials and this article?

(Objected to by defendant on the ground that it is not shown that the witness knows the composition of curaçoa. Question allowed. Exception by defendant, which exception was allowed by the court.)

A. The main difference I can give between all cordials and bitters is, that cordials—— (Objected to by defendant.) Curaçoa is made pleasant to the taste. It is used as an after-dinner liqueur. The orange peel forms a large component part of it, and it is sweetened; and, of course, brandy is used in its manufacture chiefly. It does not contain rhubarb or any drug of that character. A liqueur is sweetened alcohol with a flavoring ingredient. The main component of curoçoa is also sweetened alcohol, pleasant and agreeable to taste.

37 Q. Do you know benedictine?

A. Yes.

Q. Is that a liqueur?

A. Yes; that is called a liqueur.

Q. What is the point of difference or what are the points of difference or resemblance between that and the article in suit?

(Objected to by defendant; allowed; exception by defendant, which exception was allowed by the court.)

A. Benedictine is another cordial or liqueur which is made pleasant by flavoring, and sweetened to make it agreeable to taste, especially as an after-dinner drink, or to be taken in a very small quantity in the morning or after dinner, mainly. All these people who make these cordials have special formulas; not that they use the same ingredients, but in the way in which they manufactured it, which show a special art or a special finesse, so that they obtain in that way a great reputation; for instance, benedictine and chartreuse is similar. They do not contain articles I should call drugs. The bitters we sell are considered a tonic.

On redirect examination the witness testified that he did not know the composition of Masquelier's Boonekamp Bitters, but the Underberg Albrecht bitters are not made on the same recipe. They do not resemble each other closely. The manufacturers keep their recipes to themselves. I can only judge from taste, and judging from that they do not resemble in my opinion, and judging from taste, smell, and effects the Underberg Albrecht Boonekamp Bitters contained rhubarb and orange peel

38 but not oil of anise; he could not say exactly what the ingredients were, because Albrecht would never tell him, and because the drugs were blended. These, however, are the articles used in bitters to a greater or less extent. Benedictine and curaçoa are made to please the palate, while these tonics have a contrary effect. People will shake themselves when they drink them; that all bitters combined with spirits had a strong and bitter taste; that an article known as Boonekamp Bitters was at the present time, or had been during the last fifty years, manufactured in Europe by a great many people; that the name Boonekamp had been used for an article of various bitters; that in Holland, where the name originated, the family Boonekamp are known as the manufacturers of the bitters, and that the name of Boonekamp, and of Maag-Bitter, or stomach bitter, which H. Underberg Albrecht adopted from the Dutch originally, became identical with it; that for the past twenty years the Boonekamp Bitters manufactured by Underberg Albrecht has been a standard bitters in the trade in this country.

On recross-examination the witness testified that the bitters known as A. E. Boonekamp Bitters have been manufactured by Mr. Masquelier in Europe for the last fifty years and by him only.

The defendant further produced the evidence of Edward Stryker, employed by H. B. Kirk & Co., in the wholesale and retail liquor business in the city of New York; that the firm of H. B. Kirk & Co. at the present time, and since 1883, deal and have dealt in an article known
39 as Boonekamp Bitters, or Boonekamp-Maag Bitters of the kind manufactured by Underberg Albrecht; that it was a regular article of trade in their liquor business; that they sold it to wholesale dealers mostly as a liqueur; that they used it to mix in drinks and sell it by the glass as an ordinary drink.

The defendant further produced the evidence of Henry Cammayer, a clerk with Thurber, Whyland & Co., having charge of their wine and spirit department; that he had been in the wine and spirit trade about twenty years, and knew an article in the liquor trade known as Boonekamp Bitters or Boonekamp-Maag Bitters; that Thurber, Whyland & Co. dealt in the article, both the bitters in suit and the Underberg Albrecht Boonekamp Bitters; that they sold them mostly to grocers; that both of these kinds of bitters had been known about an equal time in the trade; that kirschwasser was sold in the same division of their store as Boonekamp Bitters, in the same department as liqueurs—the wine and spirit department.

On cross-examination he said the A. & E. Boonekamp Bitters are on our price lists and the others are not, but are in stock. We keep other articles and kinds of tonics, a general stock of stomach bitters, the Universal Stomach Compound, and Baruchs Hungarian Stomach Bitters, and Reed's Gilt Edged Tonic. In the wine and liquor department, we also sell mineral water, ginger ale and soda water, grape juice and lime juice.

Defendant further produced the evidence of Charles E. Hoffman, stock clerk at Acker, Merrill & Condit's, wholesale and retail dealers in groceries, wines, and liquors. Witness had been with them going on nine-
40 teen years, taking care of the wines, liquors, and cordials; during that time the firm had dealt in Boonekamp Bitter' but not the bitters in suit; have never known or dealt in the Boonekamp Bitters' of plaintiffs; don't know it in the trade; don't know it at all and never saw it before; they had dealt in the Boonekamp Bitters put up by Underberg Albrecht; that they sold those bitters to liquor dealers; private people used it for medicinal purposes; that the liquor dealers were the largest class of customers.

Defendant further produced the testimony of George C. McKesson, of the firm of McKesson & Robbins, wholesale druggists in New York City; had been in the business twenty years; for the last twelve years had been buying proprietary articles; had never seen the article in suit; the house of McKesson & Robbins was one of the largest drug houses in New York.

Defendant further produced the testimony of Frank S. Edminister, general manager of the R. H. McDonald Drug Co., which concern manufactured an article known as Vinegar Bitters, which had been manufactured from 1865 to the present time, and was dealt in all over the world; that the article Vinegar Bitters contained no alcohol.

Q. Can you state, without going into detail of the formulæ, or are you willing to state what the chief article of bitters is that constitutes the Vinegar Bitters?

(Objected to by plaintiffs. Question excluded. Exception by defendant, which exception was allowed by the court.)

41 Witness testified on cross-examination that he knew of no other bitters besides his company's that was made without alcohol. Am aware that it has been represented in the Drug Reporter from time to time or some other publication that our bitters contain alcohol. My impression is they said there was 12 per cent of alcohol in it.

Defendant further produced the testimony of James Duffy, jobbing and retail dealer in wines, liquors, cordials, bitters, &c., in New York City; had been in business twenty years; had been dealing in the article in suit for about two years; that in his trade he generally used it with wine, sometimes mixed with a cocktail, sometimes plain, or diluted with water; that he kept a bar and furnished drinks generally; that he was also familiar with the bitters manufactured by Underberg Albrecht in Germany, and had known that article for the last 18 or 20 years, and had dealt in it during that time; had sold it to his retail customers by the glass, diluted or plain; knew of no other Boonekamp Bitters beside those two.

Q. Which of those two do you regard as the standard Boonekamp Bitters in trade in this country?

(Objected to by plaintiff; excluded; exception by defendant, which exception was allowed by the court.)

Q. Which of the two do you deal in most at the present time?

(Objected to by plaintiff; excluded; exception by defendant, which exception was allowed by the court.)

On cross-examination the witness testified that the Boonekamp Bitters were drunk for general purposes, such as people go into a retail bar

42 for, as a tonic; that witness took them sometimes as a tonic as well as for sociability; that the taste was rather not objectionable to him. It tastes of rhubarb; used it both for tonic and rhubarb effect, not particularly as a medicine. Have sold sometimes three or four cases a year. Our Boonekamp sales are comparatively small.

On redirect examination the witness further testified that it was possible to drink half a wine glass of those bitters alone or without water; that he had often seen his customers take half a wine glass at a time.

Defendant further produced the evidence of Henry J. Smith, who had charge of the bar at the Astor House in New York City. Witness had been in the retail liquor business for twenty-five or thirty years, nearly always in hotels; that he was familiar with the article known as Boonekamp Bitters but not the bitters of the plaintiffs; that he had never known the bitters in suit, but had dealt in the Underberg Albrecht Boonekamp Bitters to ordinary customers at the bar, which is the only kind he has ever seen; that he had served those bitters to customers in whiskey and gin; that the amount of bitters, whether Angostura, Hostetters, orange, or others, is small in the case of each customer; that he bought his Boonekamp Bitters mostly from Lidgerwood & Co., wholesale liquor dealers and grocers. Plaintiffs' bitters have never been sold where I have been. All bitters that I have dealt in contain spirits. Only sell three or four cases of Boonekamp a year.

Defendant further produced the testimony of William Renn, in
43 the liquor business at the International Hotel in New York City, at the bar of that hotel; that he knew an article known as Boonekamp Bitters, but not the article in suit; had never used that nor dealt in it; that he bought Boonekamp Bitters from Acker & Merrill's, and dealt in those bitters with his customers; that some liked it in whiskey, some in gin, and some liked it straight; that he dealt in it as an article regularly over his bar.

Defendant further produced the testimony of Martin Bathman, in the retail liquor business for about sixteen years, keeping a bar; that during that time he knew an article called Boonekamp Bitters, but not the article in suit; he furnished the Boonekamp Bitters, Underberg Albrecht, to his customers; knew no other kind of Boonekamp Bitters; sold it to his customers by the pony, or with gin, or with whiskey, and sometimes put it in drinks.

On cross-examination witness testified that it was used just the same as other bitters are used, and for the same purposes.

At the close of the testimony the defendant's counsel moved the court to direct a verdict in favor of the defendant, on the ground that the plaintiffs had failed to prove either that the article in suit was a proprietary article recommended to the public for any specific medicinal purpose, or that it was prepared by a secret formula.

This motion was denied by the court, to which ruling the defendant duly excepted, which exception was allowed by the court.

44 The court then charged the jury, as follows:

"It is unnecessary for me to detain you, except to state the question which it will be for you to answer in this case, affirmatively or negatively: Is plaintiffs' bitters substantially similar to either cordials, liquors, arrack, absinthe, kirschwasser, or ratafia? In determining the question of substantial similarity you may take into consideration any or all of these compositions; the appearance presented to the senses; its adaptability for use; the uses for which it is sold; and the effect that it produces. Looking at the question of similarity or dissimilarity on those various grounds, you will determine whether it does or does not present any substantial similarity to those enumerated articles."

Defendant's counsel then requested the court to charge specifically as he had previously requested, that "paragraph 313 (Heyl Tariff Index) contains the words 'beverages or bitters,' therefore the fact of an article being bitter does not prevent it from being similar to the articles mentioned in 313."

To which motion the court replied as follows:

"The COURT. I decline to charge that, but I will instruct the jury that the testimony here is uncontradicted to the effect that absinthe has a bitter taste."

To this refusal to charge as requested the defendant duly excepted, which exception was allowed by the court.

The defendant also noted an exception to the ruling of the court
45 in sending the specific question to the jury, as embodied in the charge of his honor, the judge; which exception was allowed by the court.

The jury, after deliberation, answered the question submitted by the court in the negative.

Defendant's counsel then moved the court to direct a verdict for the defendant, as follows:

"I move the court to direct a verdict for the defendant, on the ground that the article in suit, being provided for in paragraph 99 as 'bitters,' even if your honor finds that it is proprietary article, and made by a secret formula, it is nevertheless equally provided for in paragraph 313 as 'bitters,' the same word; it is admitted on both sides to be bitters, containing spirits; the proportion of spirits is shown to be 47 per cent by weight, and 51 per cent by volume; and consequently it is equally provided for in both sections. If it is a 'bitters,' and a proprietary article, and made by a secret formula, it is equally a 'bitters containing spirits;' and consequently subject to the rate of duty under 313, and under 99; and under the last paragraph of section 2499 of the U. S. Revised Statutes as amended, the collector was entitled to assess the higher rate of duty upon it. On that ground I move for a direction of a verdict for the defendant."

This motion was denied by the court, to which denial the defendant duly excepted, which exception was allowed by the court.

The jury thereupon rendered a verdict, under direction of the court, for the plaintiffs for the sum of $563.64.

46 And for as much as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant, by his counsel, and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed and filed before the cause was given to the jury.

Witness my hand at the city of New York this 8th day of Oct., 1890.

(Signed) E. HENRY LACOMBE.

Form assented to.

HARTLEY & COLEMAN,
Pl'f's Att'ys.

47 (Indorsed:) 15576. U. S. circuit court, southern district of New York. Lewis B. Steinhardt et al. versus Joel B. Erhardt. Defendant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, , 189 . attorney for plaintiff. To , attorney for plaintiff. U. S. circuit court. Filed Oct. 8, 1890. John A. Shields, clerk.

48 Supreme Court of the United States.

JOEL B. ERHARDT, PLAINTIFF IN ERROR,
vs.
LEWIS STEINHARDT, MORRIS STEINHARDT, and Henry Steinhardt, defendant' in error. } Assignment of errors.

Afterwards, to wit, on the third Monday of the October term, in the same term before the justices of the said court at the Capitol, in Washington, come' the said plaintiff in error, by Edward Mitchell, U. S. attorney, his attorney, and say' that in the record and proceedings aforesaid

there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MI'CHELL,
U. S. Attorney and Atty. for Plaintiffs in Error.

49 (Indorsed:) 15576. United States Supreme Court. Joel B. Erhardt, plaintiff in error, vs. Lewis Steinhardt et al., defendants in error. Assignment of error. Edward Mitchell, U. S. attorney and attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 9th day of Oct., 1890. Hartley & Coleman, attorney for in error. To Hartley & Coleman, attorney' for in error. U. S. circuit court. Filed Oct. 9, 1890. John A. Shields, clerk.

50 UNITED STATES OF AMERICA, *ss:*

To Lewis Steinhardt, Morris Steinhardt, and Henry Steinhardt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the third Monday of the October term, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joel B. Erhardt is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated Oct. 8, 1890.

E. HENRY LACOMBE.

51 (Indorsed:) 15576. E. & A. A. 936. U. S. Supreme Court. Joel B. Erhardt, plaintiff in error, against Lewis Steinhardt et al., defendants in error. Citation. Edward Mitchell, U. S. attorney and attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 9 day of October, 1890. Hartley & Coleman, attorney' for defendant' in error. U. S. circuit court. Filed Oct. 9, 1890. John A. Shields, clerk.

(Indorsed on cover:) No. 334. Joel B. Erhardt, collector of the port of New York, plaintiff in error, vs. Lewis Steinhardt, Morris Steinhardt, and Henry Steinhardt. 14387. S. New York. C. C. U. S. Filed October 27, 1890. Supreme Court, U. S. Received Oct. 23, 1890. Clerk's office.

153-177

CASE No. 14387.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOEL B. ERHARDT, COLLECTOR OF the port of New York, plaintiff in error,
v.
LEWIS STEINHARDT ET AL. } No. 334.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

§ 2.) This seems to have been conceded at the trial, as no testimony was given showing whether, considering the bottles separately, the importers' rating or the collector's was the higher.

For these reasons it is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

18592——2

CASE No. 14387.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOEL B. ERHARDT, COLLECTOR OF the port of New York, plaintiff in error,
v.
LEWIS STEINHARDT ET AL. } No. 334.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid on goods imported in 1889, so that the case is governed by the tariff act of 1883. The importers claimed that the goods imported were proprietary preparations. The collector rated them as spirituous bitters similar to absinthe. The case was tried before Judge Lacombe and a jury. The court left to the jury the single question of similarity. The jury having answered this question in the negative, a verdict was directed in favor of the importers, and the collector assigns errors.

STATEMENT OF FACTS.

The articles in suit are known as Boonekamp Bitters, or, more particularly (to distinguish them from other Boonekamp bitters), as "A. E. Boonekamp Bitters" or "Boonekamp of Maag Bitters." They are a proprietary preparation recommended to the public as a proprietary article. They are also spirituous bitters with a very considerable similarity to absinthe.

The importers claimed the right to bring them in under paragraph 99, which is as follows:

> Proprietary preparations, to wit: All cosmetics, pills, powders, troches, or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases, or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum ad valorem.

The collector rated them under paragraph 313, which is as follows:

> Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon.

The word "liquors" in this last paragraph is a misprint for "liqueurs." (*Hollender* v. *Magone*, 149 U. S., 586, 589–90.)

The collector also assessed the bottles in which the bitters were imported at three cents apiece, under paragraph 310, while the importers claimed that they should have paid thirty per cent *ad valorem* under paragraph 133.

The bitters in question are made in Antwerp and advertised as a proprietary preparation made by a private formula. The label is given in the record in Dutch or Flemish, and also a wrapper in English, as well as the invoice in French (pp. 8–12). The wrapper represents the inclosed articles as "fine stomachic bitters known as 'Boonekamp,'" and "the outcome of a fortunate discovery made by Mr. A. E. Boonekamp, of Antwerp, Belgium, in the year 1815." They are advertised "as an appetizer and as a regulator to the human system;" and as having "aperient and digestive qualities." It is admitted in the wrapper that "as a preventative against all forms of epidemic disease they are unvaluable." It is stated, however, that "one spoonful taken before a meal will aid digestion and impart a healthy and vigorous action to the system. They also make a pleasant, refreshing beverage taken with water, gin, or aniseed cordial." It is claimed that unscrupulous manufacturers have got up spurious articles and have usually been made to pay heavy damages by the Belgian courts (pp. 10–11). A certified copy of the registered label from the U. S. Patent Office is also put in evidence (p. 12).

One of the plaintiffs testified that the bitters were sometimes sold to druggists, and were "used for cramps,

dysentery, or sick stomach." An agent for the bitters testified that he sold them sometimes to druggists, and that they were

> Used for the instantaneous relief of cramps or dysentery. It is used for that, and also by mixing it it is claimed to be an infallible cure for dyspepsia.
> Q. Mixing with what?
> A. Mixing with water, wines, or liquors (p. 13).

On the other hand, plaintiff admitted that "our principal trade is with liquor dealers;" and the agent testified:

> That out of 700 boxes of these bitters sold by him in a year, he sold a couple of hundred to drug stores and about 300 to liquor stores; that these bitters were sold by the liquor trade over their counters mixed with water, wine, and gin (p. 13).

As already stated, they are advertised on the wrapper "as an appetizer" and "a pleasant, refreshing beverage" (pp. 10–11).

A clerk of Thurber, Whyland & Co., a leading New York house, testified that his concern dealt both in these bitters and in the somewhat similar "Underberg Albrecht Boonekamp Bitters;" "that they sold them mostly to grocers;" that they kept them "in the same department as liqueurs—the wine and spirit department." An employé of H. B. Kirk & Co., a liquor firm in New York, testified that they sold the Underberg Bitters "to wholesale dealers mostly as a liqueur; that they used it to mix in drinks and sell it by the glass as an ordinary drink. A clerk of Acker, Merrall & Condit gave similar testimony as to the Underberg Bitters (p. 21).

James Duffy, a jobber and retail dealer in wines, liquors, cordials, bitters, etc., testified that he—

> Had been dealing in the article in suit for about two years; that in his trade he generally used it with wine, sometimes mixed with a cocktail, sometimes plain, or diluted with water; that he kept a bar and furnished drinks generally; that he was also familar with the bitters manufactured by Underberg Albrecht in Germany, and had known that article for the last 18 or 20 years, and had dealt in it during that time; had sold it to his retail customers by the glass, diluted or plain; * * * that the Boonekamp Bitters were drunk for general purposes such as people go into a retail bar for—as a tonic; that witness took them sometimes as a tonic as well as for sociability; that the taste was rather not objectionable to him. It tastes of rhubarb; used it both for its tonic and rhubarb effect, not particularly as a medicine (p. 22).

The barkeeper at the Astor House testified that he was familiar with Boonekamp Bitters, although he had dealt only in the Underberg article—

> That he had served those bitters to consumers in whisky and gin; that the amount of bitters, whether Angostura, Hostetter's, orange, or others, is small in the case of each customer (p. 22).

A bartender at the International Hotel testified that he knew Boonekamp Bitters, though not the article in suit; that he—

> Dealt in those bitters with his customers; that some liked it in whisky, some in gin, and some liked it straight; that he dealt in it as an article regularly over his bar.

Another retail liquor dealer keeping a bar testified that he dealt in the other Boonekamp Bitters:

> Sold it to his customers by the pony, or with whisky, and sometimes put it in drinks; * * * that it was used just the same as other bitters are used and for the same purposes (p. 23).

It further appeared that the bitters in suit were "not proof," as they contained, at the standard temperature, only about 47½ % of alcohol by weight, while the term "proof spirits" requires 49¼ % of alcohol by weight (p. 14). (*See also* Century Dictionary, p. 4773.)

It appeared, however, that absinthe, specifically mentioned in the bitters clause, contained only about the same percentage of alcohol as the Boonekamp Bitters, and that curaçoa, a well-known cordial, contained only from 25% to 35% (pp. 14–5). The defendant's expert chemist testified on cross-examination that all the cordials he had analyzed, except curaçoa, were above proof. It may be proper to remark here, however, that on a subsequent trial it was proved that the well-known Benedictine cordial contained less than 33% of alcohol. (*In re Gourd*, 49 Fed. Rep., 728, 729.)

Some testimony was introduced bearing on the similarity between absinthe and Boonekamp Bitters. It appeared that both contained alcohol and anisette; that absinthe also contained wormwood; that instead of wormwood, Boonekamp Bitters appeared, on examination, to contain orange-peel, tumeric, and some rhubarb; that both had

a bitter taste and a medicinal effect (pp. 15, 16, 23). It further appeared—

> That there are bitters which are known as proprietary medicines, and there are bitters known as drinks. I shall have to explain the word in two different ways—one as a drink and the other as a proprietary medicine (p. 16).

ASSIGNMENTS OF ERROR.

Defendant duly excepted to the ruling of the court in sending to the jury the following specific question:

> Is plaintiffs' bitters substantially similar to either cordials, liquors, arrack, absinthe, kirschwasser, or ratafia? (p. 23.)

Defendant's counsel also moved for the direction of a verdict for the defendant on the ground that the articles, although proprietary, were also bitters containing spirits; that the articles being equally provided for in both sections, the collector was entitled to assess the higher rate of duty under the last paragraph of §2499 of the Revised Statutes, as amended. This motion was denied by the court and defendant duly excepted. (p. 24.)

Error is assigned to each of the above rulings.

ARGUMENT.

I.

It seems to have been conceded in the court below, and it is conceded for the purpose of this argument, that the bitters in question are proprietary preparations; and that they would be dutiable as such if there were no other governing clause.

II.

It is submitted, however, that as between the clause relating to proprietary preparations and the clause relating to alcoholic beverages, the latter governs in the present case.

It is apparent that neither of these two clauses is more specific than the other. The familiar rule that the more specific designation governs can not, therefore, be applied, as was shown by Judge Carpenter in the Amer Picon Bitters case (*Curiel* v. *Beard*, 44 Fed. Rep., 551).

It is also apparent that the case can not be disposed of on any theory of Congressional preference based on public policy, such as that applied in *Magone* v. *Heller* (150 U. S., 70). In that case a less specific designation was permitted to govern on account of apparent Congressional intent to protect "substances expressly used for manure" in the interests of agriculture. An analogous intent might be imputed to Congress here, if the proprietary paragraph related only to articles of genuine medicine. The paragraph, however, not only includes all cosmetics, ointments, essences, and toilet preparations, but so far as drugs are concerned it is not even restricted to real remedies or specifics. It includes all preparations or compositions "recommended to the public as * * * prepared according to some private formula as remedies or specifics," etc.—all quack medicines, in fact, however deleterious. It is not the substance itself, or even its origin, but the claims made in its advertising circulars which are the test of classification.

It was shown in *Ferguson* v. *Arthur* (117 U. S., 482), by a comparison of the tariff and internal-revenue provisions in this regard, and a *résumé* of their history, that the reason for fixing a special rate on these proprietary articles (which in most cases seems to be comparatively a high rate) is that Congress desired to tax the *quasi*-monopoly obtained by the manufacturer through his past high reputation or judicious advertising.

So far as the chief use of the article is a proper test, a classification under beverages is indicated. It is admitted by all the witnesses that the chief use of these bitters, like Angostura, Orange, and many other bitters, is over the bar.

Even, however, were the bitters in question used no more as beverages than they are as medicines, nevertheless the beverage rate would govern because it is the higher rate. This results from the provisions of §2499 of the Revised Statutes as amended in 1883, providing that "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates."

This provision, as pointed out by the court in *Liebenroth* v. *Robertson* (144 U. S., 35, 40), is intended for precisely the present case, namely, "articles not manufactured from two or more materials, but still *prima facie* subject to 'two or more rates of duty.'" It has never been directly applied by the Supreme Court, but has been applied by the lower courts in various cases, as *Dieckerhoff* v. *Robertson* (40 Fed. Rep., 568), and *In re Wertheimer* (55 Fed. Rep., 281).

The classification of this class of bitters has not been uniform in the circuit courts.

The earliest case is *Dallet* vs. *Smythe* (6 Blatchf., 419), decided by Judge Benedict in 1869, holding Angostura bitters to be dutiable as a spirituous liquor.

These importers largely rely on *Grommes* v. *Seeberger* (41 Fed. Rep., 32) decided by Judge Blodgett, July 18, 1889. The evidence in that case would seem by the report to have indicated that Arp's Pepsin Bitters, there under consideration, were principally used as a medicine, and that the case was decided upon that ground. A writ of error to this court was dismissed; but the dismissal was not based upon any opinion as to the merits of the case. The case came up on special findings, and the record failed to include any finding that alcohol was an ingredient of the bitters. It was impossible to claim upon such a record that the bitters were spirituous beverages.

Shortly after the trial of the case at bar, the case of *Curiel* v. *Beard* (44 Fed. Rep., 551) was decided by Judge Carpenter in the district of Massachusetts. That case related to Amer Picon Bitters, which were shown to be a proprietary article prepared according to a private formula. The case was far weaker than the present one, for it was found that the bitters contained only between 30% and 40% of alcohol, and were sold to druggists and apothecaries only, and not sold in barrooms as a beverage or otherwise. Nevertheless the bitters were held to be dutiable as a spirituous beverage.

Shortly thereafter, on February 16, 1891, the case of *Wuppermann* v. *Erhardt* was tried before Judge Lacombe.

That case related to Angustura Bitters. Judge Lacombe took the same general view as in the case at bar, and a verdict was found by the jury for the importers.

The last case reported is *In re Gourd* (49 Fed. Rep., 728), relating to the well-known Benedictine cordial. This cordial is manufactured at Fécamp, in Normandy, by a company claiming to have derived its secret formula from the Benedictine monks formerly inhabiting the abbey at that place. It is advertised as an article having certain therapeutic and prophylactic qualities, and also as "a beneficent and agreeable liquor." It is, in fact, very similar to the article now before the court, except that it is properly a cordial, while the article here in suit is a bitters. Judge Wheeler affirmed a decision of the general appraisers in favor of the Government, saying:

> It seems to me, in looking this over, that the idea of Congress in those two paragraphs was to separate these things into beverages and medicinal preparations, and that whatever was medicine was to come in under one paragraph, and whatever was a beverage was to come in under the other paragraph. On the proofs I think this is a beverage, not a medicine; * * * and that, I think, is the idea, that whatever is medicinal, recommended as such—it may be good for something, or it may not, but if it is of that kind of stuff that is got up to make folks think it will cure them—that comes under paragraph 99; but if it is for a drink, for use as a beverage, and not for cure, then it will come under 313.

The importers rely mainly on the Henry's Calcined Magnesia case (*Ferguson* v. *Arthur*, 117 U. S., 482). That case related to a proprietary article claiming to be a

very fine brand, made by a special formula, of the well-known remedy calcined magnesia. The importers insisted that it should be classified at a low rate as calcined magnesia. The court held that the collector properly classified it at a comparatively high rate as a proprietary medicine. The principle of the decision was, as already stated, that Congress intended to tax not only the substance itself, but the special value attached to its proprietary character. The bill of exceptions in that case showed that the article was different from and more valuable than the ordinary commercial calcined magnesia.

> Henry's calcined magnesia is universally known by that name and has a character of its own, distinct from ordinary calcined magnesia, although it is used for the same purposes. It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last 100 years, and has a peculiar value in the market. It sells in this country at wholesale by the dozen, ounce bottles, for $8.50, and for 27 shillings in England; whereas Husband's preparation, the American preparation of the highest repute, sells at $3 or $3.50 per dozen (p. 486).

Judge Blatchford, in delivering the opinion of the court, made the following remarks:

> They recommended the article as of superior quality because of improvements which they had made in its manufacture, and stated as a result of those improvements that the article had no carbonic acid, no taste, smell, or other disagreeable property, and no roughness or grittiness to the touch or palate. * * * Although it appeared * * * that a

formula for the preparation was contained in the dispensatories, it did not appear that Henry's preparation was made according to that formula, while it did appear that it * * * had a character of its own, distinct from ordinary calcined magnesia, though used for the same purposes, etc. (p. 487). * * *.

This article is not, and does not purport to be, the calcined magnesia dutiable at 12 cents a pound. By the mode of manufacture used, the carbonic acid is eliminated, the taste and smell are destoyed, other disagreeable qualities are removed, and all grittiness is got rid of. It "has a character of its own, distinct from ordinary calcined magnesia" as the bill of of exceptions states. * * * It was undoubtedly to reach just such medicinal preparations as this—the monopoly of a particular person, commanding a price due to a special mode of manufacture, sold in bottles, having a name attached identifying the manufacturer as the proprietor of all that imparted the special merit and produced the special price—that the special revenue tax was laid. * * * Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined (pp. 488–9).

III.

Assuming, therefore, that the beverage clause governs the proprietary medicine clause, when otherwise equally applicable, the questions recur: Is this article a spirituous beverage or bitters? If it is a spirituous beverage or bit-

ters, is it "similar" to any of the articles specially enumerated? It is a bitters, and it is very spirituous. Nearly one-half of its weight and more than one-half of its volume is actually pure alcohol. It does not, indeed, belong to the class of "proof spirits;" it falls just below this standard. "Proof spirits" contain 49¼ % in weight, or over, of alcohol, while these bitters contain only 47½%. The statute does not require, however, that spirits should be "proof spirits," although the duty is regulated by the "proof gallon." (Act of 1883, par. 314; Rev. Stat., § 2504, par. 985; compare §§ 3249–51; act of July 14, 1870, c. 255, § 21; Syn. Dec., 1849.)

Absolute demonstration that the beverage clause is not confined to "proof spirits" is shown by the fact that it specifically mentions absinthe, which contains no more alcohol than the bitters here in question. These Boonekamp Bitters contain very much more alcohol than either the Amer Picon Bitters, discussed in *Curiel* v. *Beard* (44 Fed. Rep., 551), or the Benedictine cordial, discussed in *In re Gourd* (49 Fed. Rep., 728).

IV.

The Boonekamp Bitters being "spirituous beverages or bitters containing spirits," the sole question remaining is, whether they are "similar" to absinthe, the only bitters specified in the clause now under consideration. A general similarity is sufficient for the purposes of this clause, which does not contain the particular requirements of the similitude clause of § 2499.

The evidence in this case is all evidence of likeness. There is no evidence of unlikeness. Absinthe is bitter; so is the Boonekamp article. They contain precisely the same proportion of alcohol. They both contain anisette. The other ingredients are medicinal in both cases. They are both taken to some extent for their medicinal qualities. They are both taken as beverages. The collector found similarity as a fact when he classified the articles as "similar spirituous beverages or bitters containing spirits." The burden of proof was on the importers to show that the collector made a mistake. (*Arthur* v. *Unkart*, 96 U. S., 118.) The burden was upon them to show dissimilarity. They failed to produce a particle of evidence tending to rebut the presumption of similarity arising from the collector's decision. Every particle of evidence being in support of the presumption, there was no disputed question of fact in the case.

V.

As there was no disputed question of fact, the verdict in favor of the importers ought to have been set aside. For the same reason, it was error to leave the question to the jury, and defendant's motion for the direction of a verdict ought to have been granted. The rule requiring direction of a verdict when a finding to the contrary would be against the weight of evidence is applicable to tariff cases as fully as to all other cases. (*Berbecker* v. *Robertson*, U. S. S. C., March 12, 1894.) It is just as applicable to questions of similarity as to all other questions. (*Fisk* v. *Arthur*, 103 U. S., 431.) It is true that

the syllabus in *Barney* v. *Schneider* (9 Wall., 248) states that similarity is a mixed question of law and fact, and can not be withdrawn from the jury. There is nothing, in the opinion of the court, however, to sustain this proposition in the broad form thus laid down. It appeared in the bill of exceptions that there was discrepancy in the testimony, while the testimony was not fully set forth. Mr. Justice Miller said:

> Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony, and not the court's. The proposition is not, therefore, sustained that nothing but a question of law was to be decided.

The direction in that case (where a verdict was substantially, although not in form, directed) was in favor of the importers; that is, against the presumption in absence of all testimony.

In *Herrman* v. *Arthur's Executors* (127 U. S., 363, 369, 370) the direction of a verdict was held erroneous because there was evidence rebutting the presumption of similarity arising from the collector's decision.

VI.

The contents being spirituous beverages; the bottles were dutiable under paragraph 310 as containing spirituous liquors. "Liquors" is an elastic term (*Hollender* v. *Magone*, 149 U. S., 586), and is here used in a broad sense, not confined to "Schnapps." (Compare Tariff Acts of March 2, 1861, c. 68, § 6; June 30, 1864, c. 171,

§ 2.) This seems to have been conceded at the trial, as no testimony was given showing whether, considering the bottles separately, the importers' rating or the collector's was the higher.

For these reasons it is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

○

18592——2

153-177

C. G. Burgoyne's Printing Business, 146-150 C

U. S. Supreme Court.

JOEL B. ERHARDT,
Plaintiff in Error,

vs.

LEWIS STEINHARDT ET ALS.

October Term,
1893.
No. 334.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

Defendants in error imported from Belgium in July, 1889, two invoices of Boonekamp Bitters, bought from E. Masquelier, "proprietaire du secret de fabrication" (Record, fol. 14).

Plaintiff in error, Collector of the Port of New York, imposed a duty of 82 per gallon (the goods being under proof), and three cents per bottle under Schedule H, Act of March 3, 1883 (22d Statute, 505), which levies on bottles containing spirituous liquors three cents each, "and on cordials, liquors, arrack, absinthe, Kirschwasser, "ratafia and *other similar spirituous beverages or bitters*, "*containing spirits*, and not specially enumerated or "provided for in this Act, two dollars per proof "gallon."

Duties were paid under protest claiming under the following paragraph in Schedule A of the same act

(22 Stat., 494 below middle) viz. : Proprietary preparations, to wit, *all* * * cordials, *bitters*, * *tonics*, * * * spirits or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, including all toilet preparations whatever used as applications to the hair, mouth, teeth or skin, not specially enumerated or provided for in this act, fifty per cent. *ad valorem*, contending further the bottles were dutiable at thirty per centum under Schedule B of said act (22 Stats, 495 bottom) as green or colored glass bottles; * * * if filled, and not otherwise in this Act provided for said articles shall pay thirty per centum *ad valorem* in addition to the duty on the contents.

It appeared at the trial by uncontradicted evidence : (1) That the goods were invoiced, entered, labeled, bought, sold and dispensed under the name of Boonekamp Bitters or A. & E. Boonekamp Maag Bitters. (2) That they were a proprietary bitters recommended to the public as a proprietary article, and that the label had been duly registered at the Patent Office.

Testimony was given tending to show that they were prepared by a secret formula as a remedy for disease, and claimed to be valuable for aperient, digestive and tonic qualities, and used for the cure or relief of dyspepsia, cramps, dysentery or sick stomach, and that they were called patent medicines ; that they were sold to families, grocers and druggists ; that they were dealt in by dealers in patent medicines—druggists, as well as liquor dealers, and that the bitters were five degrees under proof.

Record, pages 8 to 14.

Testimony was given that the word " bitters " was not a medicinal term known to the pharmacopœia, but

that tonics containing alcohol would perhaps be popularly known as " bitters."

Record, folio 29.

On the question of " similarity " to the articles specially named in the paragraph under which duty was taken, the following testimony was given favorable to the plaintiffs :

1. Neither of them, viz., absinthe, kirchwasser, arrack nor curacoa, is a proprietary preparation.

Record, page 17, lines 1 and 2.

2. The article in suit contained drugs, especially rhubarb, a cathartic, also orange peel, tumeric, and an essential oil, presumably oil of anise.

Record, folio 28.

3. Cordials, liqueurs and the articles named in said paragraph did not contain drugs.

Record, page 20, middle.

4. They were after-dinner drinks made to please the palate, " while these tonics have a contrary effect. Peo- " ple will shake themselves when they drink them " (Record, fol. 38).

5. A bottle of the import was produced in evidence and before the jury for examination and comparison.

Evidence was also given that all bitters known to the Government analyst contained spirits (Record, p. 15, near bottom ; see, also, Record, p. 22, bottom, and near top.) One witness testified that he knew but one bitters without alcohol, and that his own (Record, p. 22, near top).

All reference to the rival Boonekamp Bitters is omitted. It is not the goods in suit, and its agent testified (Record, fol. 36) that it was not the same nor made of the same materials, nor alike (Record, fol. 37, end).

But two of defendant's witnesses sold our goods,

Cammayer (Record, p. 21), and Duffy (Record, p. 22). Duffy sold of both kinds but three or four cases a year, and Cammayer sold at wholesale mostly to grocers.

No testimony has been returned as to the bottles containing the goods except the mention on page 14 of the record, top, that there was testimony of their character and value. No error was alleged about them, and the rate of duty on them is subsidiary only, and stands or falls with the duty on the contents.

All the evidence was not returned, nor does it purport to be, but only such as was germane to the bill of exceptions.

The question at issue is purely academic. The present tariff does not provide for proprietary bitters, and in the liquor schedule the word "similar" is dropped and "bitters of all kinds" are provided for *eo nomine*.

26 Stats., p. 589, § 332.

ARGUMENT.

I.

It is admitted in the brief for the United States that the import is a proprietary bitters, and dutiable as such if there were no other governing clause.

Plaintiff in error having moved for a direction, and not having asked to go to the jury, admits the truth of all the testimony given for the importer, with all the conclusions which can properly be drawn.

Spring Co. vs. Edgar, 99 U. S., 656, top.
Merritt vs. Giddings, 115 U. S., 305.

His motion to direct a verdict because (as he alleged) two rates of duty applied to the import, admits, in terms, the plaintiff's case, on the denial of which, without any request to go to the jury, the Court

had no alternative but to direct a verdict for the plaintiff.

Record, page 24, top.
Robertson vs. Edelhoff, 132 U. S., 626, bottom.

And, in his brief here, plaintiff in error has treated the question as one of law throughout, based on conceded facts; although we do not concede that all his assumptions are correct.

II.

It is practically admitted, too, in the Government brief that the bitters in suit should be similar to the articles specially named in the paragraph under which duty was taken. If this be not so, the facts that the words similar "spirituous beverages or bitters," or equivalent terms, have been in the tariff since 1842, and the clause in its present language since 1870 would persuade us to that conclusion.

Hollender vs. Magone, 149 U. S., 589, citing Statutes.

And if that were not enough the rule of *ejusdem generis* or *noscitur a sociis* would compel the same construction.

Hollender vs. Magone, 149 U. S., 589.
Reiche vs. Smythe, 13 Wallace, 162.
Moore vs. Am. Trans. Co., 24 How., 36, below middle.
Magone vs. Am. Trading Co., 57 Fed. Rep., 394.
U. S. vs. Irwin, 5 McLean, 178.
Kitchen vs. Shaw, 7 A. and E., 729.

III.

Two grounds of error are assigned.

First, "to the ruling of the Court in sending the "specific question to the jury as embodied in the "charge of his Honor, the Judge."

This is a general exception to the charge. No error is pointed out. One cannot tell whether the objection was sending the specific question to the jury at all or to the way or to the language in which it was "embodied in the charge." If there was nothing for the jury he should have objected to it on that ground, and if he objected to the accompanying instructions as to similarity, or some of them, that ground should have been stated. If the evidence was insufficient, he should have asked for a direction.

Conn. Life Ins. Co. vs. Union Trust Co., 112 U. S., 260.
Beckwith vs. Bean, 98 U. S., 284.

The Court must know exactly what is objected to and why so, that it can pass on the objection with full knowledge.

Beaver vs. Taylor, 93 U. S., 55.

No objection to the sufficiency of evidence was taken below. It is an afterthought taken here for the first time, and he cannot take it here for the first time.

Morrell vs. Jones, 106 U. S., 467.
Badger vs. Raulet, *Ibid*, 259, 260.
Walker vs. Sauvinet, 92 U. S., 93.

If our objection to the consideration of this ground of error be overruled, it is only necessary for us to show that some evidence was before the jury, the claim here being that it should not have been submitted at all.

IV.

Counsel argues in §§ IV. and V. of his brief, that there was no disputed question of fact in the case, and that we had failed to produce any evidence tending to rebut the similarity the Collector found when he classified the articles as similar spirituous beverages or bitters containing spirits. Subject to the above objections, we say such evidence was given. The ingredients are, far as known in our import, was rhubarb, a cathartic, tumeric, orange peel and an essential oil, probably anise. The goods themselves were offered in evidence (Record, fols. 17, 28, 36 to 39).

There was no evidence that any of the articles in the paragraph contained anything of the kind. Absinthe, which contained wormwood and anisette, certainly did not. Anisette is not an essential oil. It is defined in Webster's Dictionary as a cordial flavored with the essence of anise seed—none of these articles were proprietary preparations. These were after dinner drinks prepared with exquisite care for the gratification of the palate—while, as the witness Luyties said, "people will shake themselves" when they drink these bitters. Although all the evidence does not purport to be returned, there is enough here to show beyond cavil that the similarity of our import to the articles named in the liquor schedule was a disputed fact, and evidence was given tending to show it was not, as shown in our statement of facts *(supra.* Appendix B*)*, gives the common meaning of the words, cordials, liquors, arrack, absinthe, Kirschwasser ratafia and bitters, showing they were not at all like the import, and the assertion that there is no dispute as to the similarity of these articles is, to say the least, surprising.

V.

The question of similarity and similitude is a question for the jury, and their finding is conclusive.

Greenleaf vs. Goodrich, 101 U. S., 278.
Schmeider vs. Barney, 113 U. S., 645.
Herman vs. Arthur, 127 U. S., 363.
Arthur vs. Herold, 100 U. S., 75.
Lawrence vs. Allen, 7 How., 785, 797.
Barney vs. Schmeider, 9 Wall., 248.
Gamble vs. Mason, 7 Am. Law Reg., 178.

If we prevail here, the case is at an end, because the further contention that two rates of duty apply to the import will not be available.

VI.

The remaining error assigned was the failure to direct a verdict for defendant, because of the claim that being a proprietary bitters, and a bitters containing spirits, that two rates of duty applied to the article, and, therefore, that under Section 2499, R. S., it was subject to the higher rate.

This provision of R. S. 2499 has often been invoked here, and while it is not entirely clear, the drift of the decision seems to be that it does not refer to enumerated articles.

Hartranft vs. Meyer, 135 U. S., 237.
Liebenroth vs. Robertson, 144 U. S., 35.
Hartranft vs. Langfeld, 129 U. S., 128, 135.
Robertson vs. Edelhoff, 132 U. S., 614, 626.
Benziger vs. Robertson, 122 U. S., 213, below middle.

This import is composed of two or more materials,

and the component material of chief value is not known, and, hence, the decision in Liebenroth's case excludes it from the operation of Section 2499.

It is conceded to be a substance composed of alcohol and various drugs.

But when applicable, the rule of construction invoked should only be used in cases of total repugnancy where the ordinary rules of statute construction fail to resolve the difficulty.

VII.

The proprietary paragraph has a superior enumerating force and would have justified the direction of a verdict for plaintiffs, had it been asked.

Henry's calcined magnesia, a proprietary article protected by trade-mark, and recommended as a remedy, was held dutiable as a proprietary medicine, although calcined magnesia was provided for by name. The proprietary character of the import made it a different commodity.

Ferguson vs. Arthur, 117 U. S., 482, 489.

Although our bitters contains spirits, it is a proprietary bitters containing spirits, having a special character, value and price as such, protected by trade-mark and recommended as a remedy.

18 Atty.-Genl. Opinions, 552.

These decisions were made under the Revised Statutes, but the changes made by the Tariff of 1883 strengthen the principle for which we contend.

These changes consist in striking out of the former bill the words "medicines" and "medicinal" wherever they occur, and substituting for "medicines"

the word "preparations" in one place and "articles" in the other. The words "tinctures" and "secret art" are stricken out, and "cosmetics" and "toilet preparations" are added, and the word "all" is prefixed to the names of the different preparations. As thus amended the paragraph must cover "*all* proprietary bitters," whether medicines or not, just as if the names of each were written in the law.

R. S., § 2504, PAGE 480, 2ND ED.	ACT MAR. 3, 1883, 22 STATS., 494.
Proprietary medicines: Pills, powders, *tinctures*, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other *medicinal* preparations or compositions recommended to the public as proprietary *medicines* or prepared according to some private formula, *or secret art*, as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body.	Proprietary preparations, to wit; *all cosmetics*, pills, powders, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils or preparations or compositions recommended to the public as proprietary *articles* or prepared according to some private formula as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, including all toilet preparations whatever used as applications to the hair, mouth, teeth or skin not specially enumerated or provided for in this Act.

VIII.

Necessarily a duty laid on a proprietary article must prevail over a duty laid on the same article when not proprietary, or there would be no proprietary duty at all. The superadded characteristic of ownership must prevail.

That a duty laid on an article *eo nomine* even, must yield to one laid on a class of articles to which that article belongs when designated as to be used for a particular purpose or invested with a peculiar character,

See

Magone vs. Heller, 150 U. S., 70.
Heller vs. Magone, 38 Federal Reports, 908.
Schultze vs. Cadwallader, 43 *Ibid.*, 290.

IX.

"Proprietary bitters" is a more specific term than bitters containing spirits, because all bitters should contain spirits to preserve the organic matter they contain, and proprietary bitters is therefore a limitation on the term bitters containing spirits.

See definitions of "bitters" in appendix B.

Opinion of appraiser quoted in Treasury Decision 9236, Appendix D (Record, fol. 28): Dr. Moore says alcohol was invariably an ingredient in all the bitters he had analyzed (fol. 29). Dr. Davis says: "Tonics containing alcohol or such things as are used as tonics, would, perhaps, popularly be known as bitters" (fol. 42). H. J. Smith: "All the bitters I have dealt in contain spirits." Witness Edminster (fols. 40 and 41): Knew of no other bitters but his vinegar bitters that

contained no alcohol, and his testimony should be compared with his own evidence in a later case on the present calendar (No. 557, Erhardt vs. Wupperman, Record, fol.) given in Appendix E, in which he confesses that his bitters .contain 12 per cent. of alcohol.

Take from bitters containing spirits all proprietary bitters, and there would be many left for the spirit clause to operate on, but take from the proprietary bitters all the bitters containing spirits few, if any, will be left, which is conclusive on the point.

X.

The liquor schedule has no such far-reaching scope as claimed, and does not provide for all alcoholic compounds.

Hollender vs. Magone, 149 U. S., 589.

Alcohol itself is dutiable elsewhere and in Schedule A under which we claim.

22 Stats., 494, near bottom.

The proprietary paragraph was intended to include alcoholic compounds. Three articles enumerated are necessarily spirituous—viz., "cordials," "bitters" and "spirits" (see definition in Appendix B).

Others usually so—viz., anodynes, tonics, essences, and the words "all toilet preparations whatever" would include alcoholic mixtures.

Congress was advertent to the question of alcohol in providing for proprietary articles, because just before and after in the same schedule they have distinguished between medicinal preparations which contain alcohol and those which do not, and because a clause for alco-

holic preparations not specified immediately follows the proprietary provision.

Among the medicinal preparations containing alcohol are "essences" and "spirits" especially named in the proprietary provision.

But as "*all*" proprietary bitters are provided for by the insertion of the word "all" into the Act of 1883 no proprietary bitters can be excluded.

XI.

Under the Internal Revenue laws Boonekamp Bitters have invariably been taxed as a proprietary preparation. Thsse laws are commented on in Ferguson vs. Arthur, *supra*, and the tariff of 1883 brought the propritary paragraph into close conformity with them.

Appendix C contains the principal letters and decisions.

Treasury decisions on proprietary bitters under the customs, however, have not been uniform, but in February, 1889, the Secretary of the Treasury, after a very careful examination on the whole subject, decided the bitters in suit to be proprietary, and so dutiable.

Appendix D, Treasury Decisions, 9236–9289.

These decisions were overturned by the succeeding Secretary without much consideration by Treasury Decision No. 9386 on Arp's Pepsin Bitters. That decision was reviewed in the Courts and Arp's Pepsin Bitters held to be a proprietary preperation.

Grommes vs. Seeburger, 41 Fed. Rep., 32.

Brought here by the U. S. as Seeburger vs. Grommes, 140 U. S., 696, the Atty.-General dismissed his own writ for reasons given in a letter to the Secretary of the Treasury.

Appendix D.

And, as it was ordered to be paid by the Treasury Department, *and all similar cases also*, we assume that, on the merits of the controversy, the Attorney-General could not recover.

Treasury Decision No. 11,138, in Appendix D.

It is idle to argue in his brief here that there was no proof that Arp's Pepsin Bitters contained alcohol. The presumption of law would favor the assessment, and it was for the importer to show that it did not contain alcohol.

The special finding, also given in Appendix D, shows that the question there was not materially different from the one here.

In Curiel vs. Beard, 44 Fed. Rep., 551, and *In re* Gourd, 49 *Ibid.*, 728, cited by counsel, the Court erred in holding the goods must be remedies for disease. In the Curiel case the ruling, "that proprietary *remedies* on one hand, and spiritual beverages or bitters on the other," are equally general, misquotes the law. It should be bitters on both hands—one proprietary, and one not—and, so corrected, the conclusion does not follow.

The Gourd case was one of an admitted cordial, and no question of similarity arose. It is now on appeal.

Dallet vs. Smythe, 6 Blatch, 419, also cited, was before the Act of 1883, and held that Angostura Bitters was not a *medicine*. Our import is *admitted* to fall under the proprietary clause as it now is.

Following these were decisions made after trial by the Board of U. S. General Appraisers in which these or similar bitters were held dutiable as proprietary preparations for the reasons stated. Treasury Decision No. 10,418, November 14, '90, on Fernet Bitters; No. 10,489, November 24, '90, on Boonekamp Bitters, also given in Appendix D.

Judgment should be affirmed.

EDWARD HARTLEY,
Counsel for Plaintiff in Error.

APPENDIX.

Report of the Conference of Local Appraisers held at New York, April 8 to April 20, 1889, inclusive.

SCHEDULE II.

BITTERS AND FRUIT JUICES.

PORT OF NEW YORK, APPRAISER'S OFFICE,
402 Washington Street, April 18, 1889.

SIR—Respectfully referring to that portion of your communication of April 9th, addressed to the Chairman of the Conference of Local Appraisers, which had reference to the proper classification of the varieties of bitters referred to in Department's decison of February 7, 1889 (Synopsis 9236).

With reference to the application of the two different provisions of the statute (313 and 99 T. I., new), to the subject of bitters, the conference reached the unanimous conclusion that the distinguishing features of proprietary preparations are that they are in good faith compounded according to some private formula, protected as private property by trade-mark or patent, or recommended to be taken as remedies or specifics to cure or alleviate any disease or diseases, or affections whatever, affecting the human or animal body. The fact that bitters of this character contain alcohol in greater or less proportions should not, in the opinion of the conferees, vary the above rule, since they are proprietary preparations, and are specifically provided for in 99, T. I., while the bitters referred to or provided

for in 313, T. I., are of another kind, not included in the rule above referred to, but are described as spirituous bitters containing spirits not specially enumerated or provided for in the existing tariff act.

* * * * * * *

I have the honor to be your obedient servant,

M. P. CURRAN,
Recorder.

HON. GEO. C. TICHENOR,
Assistant Secretary of the Treasury,
Washington, D. C.

APPENDIX B.

DEFINITIONS.

Webster: *Bitters*—A liquor, generally spirituous, in which bitter herbs or roots are steeped.

Worcester: *Bitters*—A liquid or a spirituous liquor containing an infusion of bitter herbs or roots.

"What was it I saw you taking for your bitters a little while ago?"—Cooper.

McEliath: *Bitters*—Stomachic drinks prepared with spirits in which bitter barks, wormwood, gentian or other ingredients have been steeped.

Webster: *Cordial*—Aromatized and sweetened spirit employed as a beverage.

Worcester: *Cordial*—Aromatized and sweetened spirit or alcohol used as a beverage.

McEliath: *Cordial*—Sweetened spirit aromatized or flavored with various substances, used as a beverage; the term liqueurs is used almost synonymously.

Webster: *Spirits*—Hence a liquid produced by distillation and especially alcohol, the spirit or spirits of wine from which it was first distilled. Hence, rum,

whisky, brandy and other distilled liquors having much alcohol in distinction from wine and malt liquors.

Worcester: *Spirits*—A term applied to all inflammable liquors obtained by distillation as brandy, rum, gin, whisky, &c. * * * The term is now confined to alcoholic liquors. Dunglison.

Webster: *Liqueur*—A delicate preparation of distilled spirits usually flavored with fruits, spices and various aromatic substances.

Arrack—A spirituous liquor manufactured in the East Indies from a great variety of substances; specifically a spirituous liquor distilled from fermented rice and from the sap of the cocoa palm.

Absinthe—A cordial of brandy flavored with wormwood.

Kirschwasser—A distilled liquor obtained by fermenting the small black cherry.

Ratafia—A fine spirituous liquor flavored with cherries, apricots, peaches or other fruits and sweetened with sugar—a term applied to the liqueurs called noyau, curacoa, &c.

APPENDIX C.

DECISIONS PUBLISHED BY THE OFFICE OF INTERNAL REVENUE.

No. 114.

CONCERNING PROPRIETARY MEDICINS OR PREPARATIONS.

JUNE, 1863.

Under schedule A of the excise law, medicines or preparations made and sold, or removed and sold,

wherever the person making or preparing the same has or claims to have any private formula or occult secret or art for making or preparing the same, or has or claims to have, any exclusive right or title to making or preparing them, or which are recommended or held out to the public by the makers, vendors or proprietors, as proprietary medicines, or as remedies or specifics for disease, are subject to stamp duties.

* * * * *

The intention of the act of Congress is plain. It is to subject to stamp duty every kind of preparation made and sold as medicinal, and claimed by the maker or vendor to be proprietary, or recommended as possessing peculiar virtues imparted in the manufacture by the secret art or occult formula of the manufacturer; and it is to exempt from duty all medicines known in trade, or compounded according to some published formula, or any medical treatise recognized by the professors of medical science, and not offered for sale under any guise or pretence of proprietorship.

It matters not, therefore, what the commodity may be, substance or essence that is prepared and removed for sale, if it is claimed or pretended to be a compound of which the formula is secret, or which the right of making is the exclusive property of one or more persons. Though it be only bread rolled into pills, or rain water imprisoned in little vials, and to be taken in drops, the claim or pretense of the vendor determines its character. It cannot be treated as medicine for the customer, and bread and water only for the tax collector. * * *

No. 126.

DECISION CONCERNING STAMP DUTIES ON PROPRIETARY ARTICLES.

TREASURY DEPARTMENT,
Office of the Internal Revenue,
WASHINGTON, October, 1863.

The stamp duties imposed in the first paragraph of Schedule C, in the Act of July 1, 1862, having been deemed by many persons to apply only to proprietary medicines, it becomes necessary to call the attention of manufacturers and dealers to the true interpretation of said Schedule.

In section 99 the subjects of the duty imposed in said schedule are spoken of as "proprietary articles"; in section 107 they are described by the words "drugs, medicines, preparations, compositions, articles or things;" in the proviso to section 109 they are described as "medicines, preparations and compositions;" in section 110 they are spoken of as "articles or commodities." In the first paragraph under Schedule C the articles or commodities made subject to stamp duty are distributed in four classes, as follows:

1st. Any preparation or composition whatsoever wherein the person making or preparing the same has, or claims to have, any private formula or occult secret or art for the making or preparing the same.

2d. Any preparation or composition whatsoever wherein the person making or preparing the same has, or claims to have, exclusive right or title to the making or preparing the same.

3d. Any preparation or composition whatsoever which is prepared, uttered, vended or exposed for sale under any letters patent.

4th. Any preparation or composition whatsoever which is held out or recommended to the public by the makers, vendors, or proprietors thereof, as a proprie-

tary medicine, or as a remedy or specific for any disease, diseases, or affections whatever affecting the human or animal body.

The descriptions contained in these four clauses embrace four distinct classes of commodities, and the first three are by no means to be treated as a mere limitation upon the fourth.

* * * * * *

All articles belonging to either of the first three classes, such as inks, blackings, cements, sauces, flavoring extracts, polishes, culinary preparations, or compositions of any nature whatsoever, which purport to have been prepared under any private formula, or occult secret or art, or in the making of which the maker claims any exclusive right or title, or which are prepared under any letters patent, are as fully subject to the stamp duty as those in the fourth class.

* * * * * *

TREASURY DEPARTMENT,
Office of the Commissioner of Internal Revenue,
WASHINGTON, D. C., April 6, 1875.

LUCIAN HAWLEY, ESQ.,
U. S. Supervisor, New York, N. Y.:

SIR—Information has been received that Frank Boehm and Julius Jungbluth, of New York City, are shipping large quantities of "Boonekamp of Maag-Bitters," a medicinal article put up in the style of patent or proprietary medicines in general, to various parts of the United States, unstamped.

You will please have this case investigated at your earliest convenience, and take the proper steps to collect the tax on what they have shipped, and to secure a compliance with the law in the future.

Very respectively,
(signed) J. W. DOUGLASS,
Commissioner.

TREASURY DEPARTMENT,
Office of the Commissioner of Internal Revenue,
WASHINGTON, D. C., Feb. 19, 1876.

JOHN ROBERTS, ESQ,
Int. Rev. Depy. Collector, Omaha, Neb.:

SIR—Your letter of Feb. 14th, inclosing labels for "Boonekamp of Maag-Bitters," has been received.

You wish to know whether these bitters are liable to stamp.

In answer, I have to say that this office has decided that the "Boonekamp of Maag-Bitters" are liable to stamp as a medicinal article.

The labels forwarded by you represent that the bitters in question are manufactured only by H. Wilhelm Adam, in Rheinberg, Germany. The bitters being held out as medicinal, and the proprietary claim made for them, in the opinion of this office, render them liable to stamps.

Very Respecfully,
(signed) D. D. PRATT,
Commissioner.

APPENDIX D.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., Feb. 4, 1891.

THE ACTING SECRETARY OF THE TREASURY:

SIR—I write to inform you that the writ of error in the case of Seeberger, Collector, vs. Grommes & Ullrich, No. 1442 on the docket of the Supreme Court of the United States for the October Term, 1890, has been dismissed by this Department. The action below was to recover duties alleged to have been illegally assessed.

The subject of the assessment was "Arp's Pepsine Bitters." The Collector assessed the importation under Schedule H of the Tariff Act of March 3, 1883, paragraph 313, T. I., as "bitters containing spirits, not specially enumerated or provided for in this act, two dollars per gallon." The taxpayers claimed that it should have been assessed under paragraph 99, Schedule A, as proprietary preparations, bitters recommended to the public as proprietary articles, or prepared according to some private formula as a remedy or specific for disease or diseases, or affections whatever affecting the human or animal body, not specially enumerated or provided for in this act, fifty per centum *ad valorem*."

The case was heard before the Court, a jury being waived in writing. The Court found the fact to be that this was a proprietary article under said paragraph 99, and was not within paragraph 313, T. I., new. No statement of the exact ingredients of the article is given except that the larger part was made up of pepsine taken from the stomachs of animals. Nowhere in the findings of this Court does it appear that the preparation contained alcohol, although, perhaps, that might be presumed. The findings of the Court, however, leave no doubt that the article was much more properly classified under paragraph 99 than under paragraph 313. On the record, as presented, it was thought useless to encumber the docket of the Supreme Court longer with a writ of error which must be ultimately dismissed.

Very respectfully,

ATTORNEY GENERAL.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss. :

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS.

John B. Grommes et al. }
vs. } No. 21,035–560.
Anthony F. Seeberger, } Assumpsit.
Collector of Customs, &c. }

SPECIAL FINDING.

Come now the parties, and this case having been submitted to the Court for trial without a jury, a jury having been expressly waived by stipulation in writing filed herein, and the Court having heard the evidence and arguments of counsel, finds the facts especially as follows :

* * * * * *

3. That the Bitters in question are not sold separately as a drink or beverage in bar rooms or drinking places, but are sometimes kept in such places to be mixed with wine or spirits when sold for drinks, and that the chief sale of these Bitters is to druggists, restaurants and hotel keepers.

From these facts I find and conclude that the Bitters in question are a proprietary preparation within the provisions of clause 99, Schedule A, of Section 2502 of the Tariff Law of March 3, 1883, which clause is as follows :

* * * * * *

The subject of the assessment was "Arp's Pepsine Bitters." The Collector assessed the importation under Schedule H of the Tariff Act of March 3, 1883, paragraph 313, T. I., as "bitters containing spirits, not specially enumerated or provided for in this act, two dollars per gallon." The taxpayers claimed that it should have been assessed under paragraph 99, Schedule A, as proprietary preparations, bitters recommended to the public as proprietary articles, or prepared according to some private formula as a remedy or specific for disease or diseases, or affections whatever affecting the human or animal body, not specially enumerated or provided for in this act, fifty per centum *ad valorem*."

The case was heard before the Court, a jury being waived in writing. The Court found the fact to be that this was a proprietary article under said paragraph 99, and was not within paragraph 313, T. I., new. No statement of the exact ingredients of the article is given except that the larger part was made up of pepsine taken from the stomachs of animals. Nowhere in the findings of this Court does it appear that the preparation contained alcohol, although, perhaps, that might be presumed. The findings of the Court, however, leave no doubt that the article was much more properly classified under paragraph 99 than under paragraph 313. On the record, as presented, it was thought useless to encumber the docket of the Supreme Court longer with a writ of error which must be ultimately dismissed.

Very respectfully,

ATTORNEY GENERAL.

UNITED STATES OF AMERICA, } ss. :
Northern District of Illinois, }

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS.

John B. Grommes et al.
vs.
Anthony F. Seeberger, Collector of Customs, &c.

No. 21,035–560.
Assumpsit.

SPECIAL FINDING.

Come now the parties, and this case having been submitted to the Court for trial without a jury, a jury having been expressly waived by stipulation in writing filed herein, and the Court having heard the evidence and arguments of counsel, finds the facts especially as follows :

* * * * * *

3. That the Bitters in question are not sold separately as a drink or beverage in bar rooms or drinking places, but are sometimes kept in such places to be mixed with wine or spirits when sold for drinks, and that the chief sale of these Bitters is to druggists, restaurants and hotel keepers.

From these facts I find and conclude that the Bitters in question are a proprietary preparation within the provisions of clause 99, Schedule A, of Section 2502 of the Tariff Law of March 3, 1883, which clause is as follows :

* * * * * *

TREASURY DECISIONS.

(9236.)

SPIRITUOUS BEVERAGES; WHAT ARE CONSIDERED PROPRIETARY PREPARATIONS; BOONEKAMP OF MAAG, FERNET AND DR. RICHTER'S ANCHOR STOMACH BITTERS—DUTIABLE AS.

TREASURY DEPARTMENT, February 7, 1889.

SIR—The Department duly received your letter of the 15th of December last, further in relation to the appeals (4952*s*, 5255*s* and 5256*s*) of Luyties Bros., (9279*s* and 9280*s*) of Cella Bros., and (9377*s*) of Knauth, Nachod & Kuhne, from your assessment of duty under the provisions of T. I., 313, on certain "Boonekamp of Maag Bitters," Fernet Bitters and Dr. Richter's Anchor Stomachal Bitters, claimed by the importers to be dutiable under the provisions of T. I., 99, for proprietary preparations, including bitters.

It appears that the bitters in question come in bottles having labels protected by trade-marks, and are recommended as remedies for specific ailments, to be taken in doses prescribed by the proprietors, and are not intended or fit for use as beverages, but that all these bitters contain considerable quantities of spirits (from 44½ to 46½ per cent. by volume), and were, therefore, classified by you under the above-mentioned paragraph 313, which covers "cordials, liquors, &c., and other similar spirituous beverages or bitters containing spirits."

The appraiser at your port expresses the opinion, however, that, inasmuch as to his knowledge all bitters contain spirits, and as bitters are mentioned among other proprietary preparations in T. I., 99, the provision in paragraph 313 is applicable only to bitters which are not proprietary, and which are beverages similar to the articles therein mentioned; and it appears that this

opinion is in accordance with the views of the majority of United States Appraisers, as expressed in their monthly conferences. It is, moreover, represented by both the appraiser and appellants that the provision in T. I., 313, was intended to cover only such bitters containing spirits as are used, or are fit for use, as "spirituous beverages" and not strictly medicinal bitters. Upon an examination of the two provisions mentioning bitters, and also of all the provisions in the tariff relating to any compounds or liquors containing spirits in greater quantities than allowed for wines (24 per cent.), the Department has reached the conclusion that the bitters in question are specially provided for under the head of proprietary preparations in paragraph 99, and hence are not included in the provisions of paragraph 313. You will, therefore, reliquidate the entries accordingly, and take the necessary steps for the refunding the excessive duties, if any.

* * * * * *

Respectfully yours,

I. H. MAYNARD,

Assistant Secretary.

COLLECTOR OF CUSTOMS, New York.

PROPRIETARY PREPARATIONS—ANGOSTURA AND AROMATIQUE BITTERS, DUTIABLE AS.

TREASURY DEPARTMENT, March 15, 1889.

SIR—The Department is in receipt of your two letters of the 4th and 6th ultimo respectively, transmitting the following appeals from your action in assessing duty at the rate of $2 per gallon and 3 cents per bottle on certain so-called "Angostura" and "Aromatique Bitters," imported into your port and originally returned for duty at the above rates, under the provisions for "spirituous beverages or beverages con-

taining spirits" (T. I., 313), "and spirituous liquors imported in bottles," &c. (T. I., 310).

* * * * * *

The importers claim in each instance that the merchandise consists of proprietary preparations, and that duty should be assessed thereon at the rate of 50 per cent. *ad valorem* for the bitters (T. I., 99) and at the rate of 30 per cent. *ad valorem* (T. I., 313) on the bottles containing the same.

The appraiser now reports, under date of the 7th inst., that the above mentioned articles are proprietary preparations, and that it would seem incumbent under the law and Department's decisions heretofore made to classify them as such; that they are protected by trade-marks; are made from a private formula; are medicinal in character; are not used as beverages, and that the bottles containing them are labeled as follows:

"Cures dyspepsia, diarrhea, cholera, loss of appetite, cholerine, flatulency, hypochondriasis, colic, accumulation of mucus in the ailmentary canal, impaired digestion, sick headache, and all other diseases arising from disorder of the stomach or liver."

In view of these reports and of the Department's decision of the 7th ultimo (appeal 4952 S, Circular No. 13, paragaph 12) holding that "Boonekamp of Maag Bitters" and others, are dutiable as proprietary preparations, the appeals above mentioned would appear to be well taken, and you are hereby authorized to reliquidate the entries accordingly and take measures for refunding to the importers the duties exacted in excess.

Respectfully yours,

I. H. MAYNARD,
Assistant Secretary.

COLLECTOR OF CUSTOMS, New York.

(11,138)

"ARP'S PEPSIN BITTERS."

TREASURY DEPARTMENT, May 14, 1891.

SIR: The Department is in receipt of your letter of the 20th ultimo, transmitting certified copies of mandates of the Supreme Court affirming the Judgments of the circuit court for the northern district of Illinois in the following suits, viz.: No. 20,930, Grommes *et al.* vs. Anthony F. Seeberger, collector of customs at Chicago, involving the proper classification of so-called "Arp's Pepsin Bitters," and No. 21,034, Owsley *et al.* vs. Anthony F. Seeberger, collector of customs at Chicago, involving the proper classification of certain iron forgings, Judgments having been rendered in favor of the importers in the circuit court in the suits involved.

In the former suit (No. 20,930) it is held that the merchandise in the case, viz., "Arp's Pepsin Bitters," was properly dutiable at the rate of 50 per centum *ad valorem* as a "proprietary preparation," under paragraph 99 of the act of March 3, 1893, and not at the rate of two dollars per proof gallon as spirituous beverage or bitters containing spirits, under the provisions of paragraph 313 of the aforesaid act, as assessed by the collector.

* * * * * *

Judgment having been entered in the United States circuit Court in pursuance of the mandates of the Supreme Court in the said suits, you are directed to take the necessary steps for their settlement, forwarding the usual certified statement to this Department.

A similar course may be pursued in regard to any other suits pending at your port involving the same questions, provided the requirements of the law as to

taining spirits" (T. I., 313), "and spirituous liquors imported in bottles," &c. (T. I., 310).

* * * * * *

The importers claim in each instance that the merchandise consists of proprietary preparations, and that duty should be assessed thereon at the rate of 50 per cent. *ad valorem* for the bitters (T. I., 99) and at the rate of 30 per cent. *ad valorem* (T. I., 313) on the bottles containing the same.

The appraiser now reports, under date of the 7th inst., that the above mentioned articles are proprietary preparations, and that it would seem incumbent under the law and Department's decisions heretofore made to classify them as such; that they are protected by trade-marks; are made from a private formula; are medicinal in character; are not used as beverages, and that the bottles containing them are labeled as follows:

"Cures dyspepsia, diarrhea, cholera, loss of appetite, cholerine, flatulency, hypochondriasis, colic, accumulation of mucus in the ailmentary canal, impaired digestion, sick headache, and all other diseases arising from disorder of the stomach or liver."

In view of these reports and of the Department's decision of the 7th ultimo (appeal 4952 S, Circular No. 13, paragaph 12) holding that "Boonekamp of Maag Bitters" and others, are dutiable as proprietary preparations, the appeals above mentioned would appear to be well taken, and you are hereby authorized to reliquidate the entries accordingly and take measures for refunding to the importers the duties exacted in excess.

Respectfully yours,

I. H. MAYNARD,
Assistant Secretary.

COLLECTOR OF CUSTOMS, New York.

(11,138)

"ARP'S PEPSIN BITTERS."

TREASURY DEPARTMENT, May 14, 1891.

SIR: The Department is in receipt of your letter of the 20th ultimo, transmitting certified copies of mandates of the Supreme Court affirming the Judgments of the circuit court for the northern district of Illinois in the following suits, viz.: No. 20,930, Grommes *et al.* vs. Anthony F. Seeberger, collector of customs at Chicago, involving the proper classification of so-called "Arp's Pepsin Bitters," and No. 21,034, Owsley *et al.* vs. Anthony F. Seeberger, collector of customs at Chicago, involving the proper classification of certain iron forgings, Judgments having been rendered in favor of the importers in the circuit court in the suits involved.

In the former suit (No. 20,930) it is held that the merchandise in the case, viz., "Arp's Pepsin Bitters," was properly dutiable at the rate of 50 per centum *ad valorem* as a "proprietary preparation," under paragraph 99 of the act of March 3, 1893, and not at the rate of two dollars per proof gallon as spirituous beverage or bitters containing spirits, under the provisions of paragraph 313 of the aforesaid act, as assessed by the collector.

* * * * * *

Judgment having been entered in the United States circuit Court in pursuance of the mandates of the Supreme Court in the said suits, you are directed to take the necessary steps for their settlement, forwarding the usual certified statement to this Department.

A similar course may be pursued in regard to any other suits pending at your port involving the same questions, provided the requirements of the law as to

protest and appeal and institution of suit have been fully complied with.

* * * * * *

Respectfully yours,
O. E. SPAULDING,
Assistant Secretary.

COLLECTOR OF CUSTOM, Chicago, Ill.

(10,418—G. A. 109.)

FERNET BITTERS.

NEW YORK, November 14, 1890.

BEFORE THE BOARD OF UNITED STATES GENERAL APPRAISERS AT NEW YORK, NOVEMBER 14, 1890:

In the matter of the protests, Nos. 752*a*, 752½*a* and 636*a*, against the rate of duty assessed by the collector of the port of New York, on certain bitters, imported per vessels described in accompanying schedule.

OPINION BY WILKINSON, GENERAL APPRAISER.

The merchandise in question is Fernet Bitters, on which duty was assessed at $2 per gallon and 3 cents a bottle, under T. I., 313, act of March 3, 1883, while the appellant claims that the classification should have been "proprietary preparations," at 50 per cent., under T. I., 99, and 30 per cent. on the bottles, under T. I., 133.

The fact that Fernet Bitters is entitled to recognition as a proprietary preparation does not seem to be questioned (Synopsis 9236). The rate of duty assessed was based on the ground that the article may be classified with equal propriety as "bitters," under T. I., 313, and that where two or more rates are applicable the highest must prevail, section 2499, Revised Statutes.

T. I., 313, provides for "cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spiritous beverages or bitters." In its use or adaptability for use, French Bitters is not similar to the beverage mentioned in this paragraph. Indeed, it was held by the Department in Synopsis 9236 that this is one of a number of bitters not intended or fit for use as a beverage.

As Fernet Bitters fulfills all the requirements of a proprietary preparation under T. I., 99, and cannot with equal propriety be classified under T. I., 313, the claim of the appellants is hereby sustained as to both the merchandise and bottles, and the entry should be reliquidated accordingly.

(10,489. G. A., 139).

BOONEKAMP BITTERS, A PROPRIETARY PREPARATION.

NEW YORK, November 24, 1890.

SIR—The protest (No. 449, B) received with your letter of the 15th ultimo, of Messrs. Luyties Brothers, against your assessment of duty, at the rate of $2 per gallon and three cents per bottle, on certain Boonekamp bitters, imported per "Rahne," September 19, 1890, is hereby sustained, being in accordance with our ruling of the 14th instant, not yet printed.

The claim of the importers that it is entitled to entry as a propriatary preparation under paragraph 99 of the tariff act of Mch. 3, 1883, is considered as well founded.

Collector of Customs, San Francisco, Cal.

APPENDIX E.

TESTIMONY OF FRANK S. EDMINSTER AS STATED IN RECORD IN ERHARDT V. UMPPERMAN, NO. 557, OCTOBER TERM, 1893, OF THIS COURT.

FRANK S. EIDMINSTER, who being duly sworn as a witness for the Defendant, testified in substance: My business is Treasurer of the R. H. McDonald Drug Co.; their business is manufacturing of Vinegar Bitters principally; have been connected with the Company since 1872; in my present capacity for only two years; prior to my present position I travelled for the company; was manager and held various positions, and was in the Manufacturing department; the article vinegar bitters made by my company has been known in this country about 30 years; I have known it since 1870.

Q. Will you please state to the Court and Jury whether there is any alcohol contained in the vinegar bitters?

A. There is not.

Q. Was there any spirits contained in them at the time of the passage of the Tariff Act of March 3, 1883?

A. No; I would like to modify that statement in this way: That by analyzing it is found that there will generate from sugar that enters into it about 12% of alcohol; I believe that it will show that; that is all; there is no alcohol used in the preparation—in the manufacture—of vinegar bitters; whatever alcohol may afterwards be found in the bitters is generated by the compound; I have had my chemist analyze it, there is from 10 to 12 per cent., not more than that; it is rarely below 10%; this vinegar bitters has been extensively

sold in the United States at and prior to March 3, 1883.

Being cross-examined by plaintiff's counsel, witness testified :

I have had quite an experience in the manufacture of Bitters, and have endeavored to discover a method of making bitters without alcohol.

Q. Are there any other bitters besides yours that you know of in this country that are made without containing alcohol ?

A. Atwood's Jaundice Bitters. I have examined very many bitters, and I can tell from my experience from the taste and smell immediately whether there is alcohol to any extent in any bitters.

Q. Is not alcohol to some extent necessary in order to preserve the herbs, roots and other articles which are contained in the bitters, so as to keep it for any length of time ?

A. It is calculated that it takes 20% of alcohol to preserve any medicine ; that is wherein our secret manufacture of the vinegar bitters is superior to all others, from the fact that we can preserve it without alcohol.

Q. Except these 12% ?

A. You can find some alcohol in almost anything ; in my opinion it is necessary in the manufacture of bitters to have in or to produce alcohol to some extent as a preservative of the other contents of the bitters.